STATE OF MICHIGAN

COURT OF APPEALS

SUZANNE M. ZAPCZYNSKI,

Plaintiff-Appellant/Cross-Appellee,

v

NORMAN F. ZAPCZYNSKI,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
November 24, 2009

No. 285982
Macomb Circuit Court
LC No. 2007-000359-DO

Before: Fort Hood, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

In this divorce action, plaintiff, Suzanne M. Zapczynski, contends that the trial court erred when it ruled that the parties' antenuptial[1] agreement is valid and enforceable and also erred in its interpretation of the distribution of assets provision of the agreement. On cross-appeal, according to defendant, Norman F. Zapczynski, the trial court erred when it awarded plaintiff a sum of $100,000 representing 50% of the increase in value of the marital home during the marriage and erred when it awarded plaintiff a 2001 Jaguar because evidence showed it was defendant's separate property. Because the trial court did not err when it held that the antenuptial agreement was valid and enforceable we affirm in part, because the trial court errantly interpreted the contract to conclude that income earned from employment or income earned from a business during the marriage was separate property pursuant to the specific terms of the antenuptial agreement we reverse in part and remand for further proceedings. Because the trial court erred when it awarded plaintiff half of the amount of the appreciation of the marital home in the amount of $100,000 contrary to the plain language of the antenuptial agreement, we vacate that part of the award. And finally, because the trial court did not err when as part of its equitable disposition of property it awarded plaintiff a family vehicle comparable to the 2001 Jaguar,[2] we affirm that distribution.

[1] This opinion uses the terms antenuptial and prenuptial interchangeably.

[2] The judgment of divorce prepared by the parties stipulated that defendant provide plaintiff with the actual 2001 Jaguar she was driving during the marriage, but that was by agreement of the parties rather than attempting to find a comparable vehicle as instructed by the trial court at the
(continued…)

I

The parties met through a mutual friend in June 2000 at the MGM Casino in Detroit. The parties dated until defendant proposed marriage to plaintiff in early 2001. Both plaintiff and defendant had one previous marriage that ended in divorce. Plaintiff's first marriage lasted from 1977 through 1989, and she has no children. Defendant's first marriage was also a long-term marriage. Defendant filed for divorce from his first wife on October 2, 1997 and the proceedings lasted until September 6, 2000 when the divorce became final. Defendant has three children from his first marriage and no other children. Defendant is the majority owner of Posen Construction, a large construction company headquartered in Shelby Township, Michigan. Plaintiff is a licensed cosmetologist and was a salon owner. During the parties' engagement, plaintiff sold her 50% ownership interest in the salon.

Prior to their marriage, plaintiff and defendant retained separate family law attorneys for the purpose of drafting an antenuptial agreement. During the negotiations, the parties each presented the other with a balance sheet that was ultimately made part of the antenuptial agreement pursuant to Section 2 of the agreement:

> FULL DISCLOSURE OF ASSETS, INCOME AND LIABILITIES. [Defendant] and [plaintiff] agree that they have made a full and complete disclosure of their assets and income to each other. A complete inventory of the assets and liabilities of [defendant] is attached hereto as Exhibit "1". A complete inventory of the assets and liabilities of [plaintiff] is attached hereto as Exhibit "2". [Plaintiff] and her counsel have reviewed and have been provided with copies of [defendant's] personal tax returns for the years 2000 and 2001. Although values for many of the assets fluctuate and appraisals of the value of assets are subject to differences of opinion, each acknowledges that they have clearly and completely disclosed to each other their assets and their liabilities.

Defendant's balance sheet at "Exhibit 1" was dated May 25, 2002 and listed assets and liabilities as follows:

ASSETS

Cash	$1,500,000.00
Personal Property	200,000.00
Note Receivable, Posen Construction Inc.	370,000.00
Real Property, 3675 Auburn Road (at estimated market value)	261,000.00
Real Property, 3701 Auburn Road (at estimated market value)	30,897.00
Real Property, 12122 23 Mile Road (at estimated market value)	2,500,000.00
Real Property, 32841 North River Road (at estimated market value)	300,000.00

(…continued)

bench trial.

Real Property, Lot 44 – North River Road – Harrison Twp. (at estimated market value)	800,000.00
Unlisted stock, Posen Construction Inc. (value as of May, 2002)	8,818,653.00
Unlisted stock, Stress Con Industries Inc. (value as of May, 2002)	4,815,585.00
Retirement Fund – IRA	37,500.00
TOTAL ASSETS:	$19,634,013.00
LIABILITES	
None	-0-
TOTAL ASSETS & LIABILITIES	$19,634,013.00

Plaintiff's balance sheet at "Exhibit 2" is also dated May 25, 2002 and includes total assets of cash in the amount of $700,000 which states is proceeds from the sale of her home and business, and zero liabilities. Both parties signed their balance sheets certifying that the balance sheets were accurate "to the best of [his or her] knowledge." Further, defendant executed a "Supplement to Balance Sheet" dated May 25, 2002 stating as follows:

> SUPPLEMENT
>
> The following assets are jointly held:
>
> > Unlisted stock of Posen Construction Inc., Stress Con Industries Inc. and Real property 3701 Auburn Road, 3675 Auburn Road and 12122 23 Mile Road.
>
> The values indicated reflect the value of Norman F. Zapczynski's share of the joint assets.
>
> The value of Stress Con industries includes Stress Con and its four subsidiaries. The total value of the assets of Norman F. Zapczynski are estimated and may be plus or minus approximately $4,000,000.00.

After a series of meetings between the parties and their attorneys, the parties signed the antenuptial agreement on May 21, 2002. At the time of signing, plaintiff was 43 years old and defendant was 52 years old. The agreement limited the parties' interests in the property previously owned by the other as well as that property acquired in their individual names during the marriage. In the event of divorce, the agreement provided a graduated amount of property plaintiff would receive based on years of marriage including the following provision:

> If the parties are married between 5 and 15 years, [plaintiff] would be entitled to receive $75,000.00 per year of marriage for the first 15 years of marriage, prorated for any portion of a year.

The parties married on May 25, 2002. About six weeks later, on July 9, 2002, defendant and plaintiff both executed a second supplement to defendant's balance sheet in the antenuptial agreement. "Supplement – II to Balance Sheet, May 25, 2002" states as follows:

> SUPPLEMENT - II
>
> Although no liabilities are listed in the original Balance Sheet, Norman F. Zapczynski does owe a payment to his former wife, pursuant to a Consent Judgment of Divorce, dated September 6, 2000. The amount is $219,600.00 per year for 10 years or until the death of his former wife. Responsibility for said payments is totally that of Norman F. Zapczynski.
>
> At the time of the execution of the Antenuptial Agreement on May 21, 2002, Suzanne Rhodes was aware of the above listed debt to Norman F. Zapczynski's former wife, Linda Zapczynski.

During the marriage the parties lived in two homes, one in Michigan located at 32857 North River Road in Harrison Township and another located on Shady Knoll Lane in Bonita Springs, Florida. Defendant owned and was in the process of building the Michigan residence prior to the parties' marriage. Testimony indicated that the construction of the home was almost entirely complete at the time of the marriage. Defendant included the house at 32857 North River Road in Harrison Township on his May 25, 2002 balance sheet as "Real Property, Lot 44 – North River Road – Harrison Twp." valued at $800,000. The parties purchased the Florida home in Bonita Springs during the marriage.

Among other reasons, both parties agree that the breakdown of the marital relationship between the parties was friction with regard to parenting defendant's three children. Plaintiff filed for divorce on January 18, 2007. Defendant answered plaintiff's complaint for divorce on February 1, 2007 asserting that the parties' antenuptial agreement was fully enforceable and that all assets and liabilities should be distributed pursuant to the antenuptial agreement. Defendant also filed a counter-complaint for divorce on February 21, 2007. Plaintiff answered on February 26, 2007.

On August 24, 2007, defendant filed a motion for partial summary disposition regarding the enforceability of the antenuptial agreement asserting that the parties' antenuptial agreement "was properly executed and is fully enforceable." Plaintiff responded on August 27, 2007 with her notice presenting grounds for the invalidity and unenforceability of the antenuptial agreement. Plaintiff alleged that defendant failed to disclose certain assets and liabilities and that defendant misstated the value of many assets by overinflating their value to the extent that his net worth was actually in the range of $10,000,000 rather than the $19,634,013 defendant represented in his May 25, 2002 balance sheet. Plaintiff also filed a response to defendant's motion for partial summary disposition on September 7, 2007. Likewise, on September 7, 2007, defendant filed a response to plaintiff's notice.

In a sixteen-page opinion and order dated September 29, 2007, the trial court granted defendant's motion for partial summary disposition concluding that the antenuptial agreement was valid and enforceable. The trial court concluded that there was evidence that plaintiff knew about certain of defendant's assets that were not specifically included on his balance sheet

including a 1998 Cadillac and a 2000 Corvette and that these were not material misrepresentations; that plaintiff clearly knew about defendant's $2,190,000 liability to his former wife prior to the execution of the antenuptial agreement as well as the execution of Supplement II; and, that defendant prepared his balance sheet using the same processes he does to run his business meaning that the balance sheet was a good-faith estimation, and that the balance sheet was a full and fair disclosure despite the overestimation.

The matter proceeded to trial on April 8, 2008. At the close of the proofs, the trial court made findings of fact on the record and also memorialized its division of the marital property pursuant to its interpretation of the terms of the antenuptial agreement. The trial court ordered that each party keep the property it brought into the marriage as well as any proceeds generated by that property during the marriage. In regard to the marital property, the trial court ordered that defendant provide plaintiff with cash payments in the amount of $440,250 pursuant to the terms of the antenuptial agreement (defendant was to pay plaintiff $75,000 per year because the parties were married over five years), $100,000 representing 50% of the appreciation in value of the parties' Michigan home during the marriage, $51,500 representing 50% of the $103,000 that defendant did not deposit to the parties' joint account while the case was pending. The trial court also ordered that the parties' Florida home be immediately sold and plaintiff was to receive 50% of the equity from the sale ($650,000). The trial court also returned plaintiff's separate cash assets to her and awarded her 50% of the parties' joint accounts. Finally, the trial court ordered that defendant provide plaintiff with a family car comparable to what she customarily drove during the marriage, a 2001 Jaguar XKR. The trial court issued the judgment of divorce on May 23, 2008. It is from this order that plaintiff appeals and defendant cross-appeals.

II

Plaintiff's first two issues on appeal arise from the trial court's partial grant of summary disposition holding that the parties' antenuptial agreement was valid and enforceable. Because these two issues overlap, we will address them as one. We review a trial court's determination regarding a motion for summary disposition de novo. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Id*. MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5).

Initially, the moving party has the burden of supporting its position with documentary evidence, and, if so supported, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact. *Quinto, supra* at 362; see also MCR 2.116(G)(3) and (4). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto, supra* at 362. Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id*. at 363. "A genuine issue of material fact exists when the record, giving the benefit of reasonable

doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Plaintiff first argues that the trial court improperly granted summary disposition in favor of defendant finding the parties' antenuptial agreement valid when there existed genuine issues of material fact relative to the requirement that defendant make a "full and frank disclosure" of his net worth to plaintiff incident to the negotiation and execution of the agreement. Specifically, plaintiff asserts on appeal that the trial court should have found that when viewing the evidence in a light most favorable to her, genuine issues of material fact existed regarding whether during the parties' negotiations: 1) defendant disclosed all of his assets, 2) defendant misrepresented the value of his assets, and/or 3) defendant misrepresented the magnitude of his net worth. Defendant replies that the trial court correctly enforced the parties' antenuptial agreement because defendant fully disclosed his net worth to plaintiff during the parties' negotiations.

The trial court reached these issues in its opinion and order granting partial summary disposition in favor of defendant when it held that defendant did not fail to disclose assets and thus the antenuptial agreement was valid. We review for an abuse of discretion a trial court's determination that a prenuptial agreement is enforceable. *Rinvelt v Rinvelt*, 190 Mich App 372, 382; 475 NW2d 478 (1991).

In her brief on appeal, plaintiff asserts that she provided irrefutable evidence that a genuine issue of material fact existed because plaintiff furnished the trial court with defendant's net worth statements from December 31, 2001 and December 31, 2002 which showed his net worth to be $8,634,013 and $10,171,560 respectively which called into question his balance sheet dated May 25, 2002 in the amount of $19,634,013. Plaintiff also asserts that she provided evidence that plaintiff misrepresented the value of his most substantial asset, Posen Construction, Inc. again in the form of defendant's net worth statements from December 31, 2001 and December 31, 2002 which showed his interest in Posen Construction to be $1,818,653 and $1,889,379 respectively which was in direct contravention of defendant's balance sheet dated May 25, 2002 in the amount of $8,818,653. Further, plaintiff asserts that defendant failed to reference his interests in ZDZ Properties, LLC and Auburn Rental Company, as well as accounts he had at Standard Federal Bank and UBS Paine Weber, and a 1998 Cadillac and a 2000 Corvette. Taking all of these assertions together, plaintiff alleges that defendant's disclosure was "grossly inaccurate and incomplete" and because she provided evidence that defendant did not provide her with a "full and frank" disclosure, the trial court was required to refuse to give effect to the antenuptial agreement.[3]

MCL 557.28 states "[a] contract relating to property made between persons in contemplation of marriage shall remain in full force after marriage takes place." Michigan courts have also held that prenuptial agreements are enforceable in the context of divorce.

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[3] While plaintiff alleged in the trial court that defendant did not disclose his liability to his former wife to her during the antenuptial agreement negotiations between the parties, she does not raise that argument again on appeal.

Rinvelt, supra at 379. To be enforceable, prenuptial agreements must be "fair, equitable, and reasonable under the circumstances, and must be entered into voluntarily, with full disclosure, and with the rights of each party and the extent of the waiver of such rights understood." *Id*. at 378-379. The agreement "should be free from fraud, lack of consent, mental incapacity, or undue influence." *Id*. at 379.

Additionally, "such agreements may be voided if certain standards of 'fairness' are not satisfied." *Reed v Reed*, 265 Mich App 131, 142-143; 693 NW2d 825 (2005). The *Reed* Court stated specifically that, "[a] prenuptial agreement may be voided (1) when obtained through fraud, duress, mistake, or misrepresentation or nondisclosure of material fact, (2) if it was unconscionable when executed, or (3) when the facts and circumstances are so changed since the agreement was executed that its enforcement would be unfair and unreasonable." *Id.* "The party challenging the agreement bears the burden of proof and persuasion." *Rinvelt, supra* at 382. Here, plaintiff advances no argument on appeal with regard to the second and third fairness standards. Instead, plaintiff focuses her argument on the "misrepresentation" and "nondisclosure of material fact" portions of the first fairness standard set out in *Reed, supra*. Because plaintiff makes separate arguments regarding the alleged non-disclosure of, or misrepresentation of material facts regarding the value of different assets, we address the items in turn.

A. Defendant's Net Worth/Value of Defendant's Largest Asset: Posen Construction

Plaintiff contends that the trial court should have summarily refused to uphold the validity of the parties' antenuptial agreement because defendant grossly overstated the value of his net worth because this was an action in direct derogation of the requirement that he make a "full and frank disclosure" of his assets and net worth citing *In re Benker's Estate*, 416 Mich 681; 331 NW2d 193 (1982). Our Supreme Court explained in *In re Benker's Estate* that "[i]n order for an antenuptial agreement to be valid, it must be fair, equitable, and reasonable in view of the surrounding facts and circumstances. It must be entered into voluntarily by both parties, with each understanding his or her rights and the extent of the waiver of such rights." *Id*. at 689. It further counseled,

> Where, as is usually the case, the parties to an antenuptial property settlement occupy a confidential relationship toward one another, and the agreement substantially affects the property interests which one or the other would otherwise acquire by the marriage, each is under an affirmative duty to disclose to the other the nature of his property interests so that the effect of the agreement can be understandingly assessed, and in the absence of such a full and frank disclosure, the courts will refuse to give effect to such an agreement attacked by the spouse to whom disclosure should have been made. [*Id*. at 689-690.]

Our review of the documentation provided to the trial court reveals that there were only two differences between defendant's December 31, 2001 balance sheet and his May 25, 2002 balance sheet used for purposes of the antenuptial agreement. Both differences relate to defendant's valuation of the unlisted stock in two of his business ventures, Posen Construction Inc, and Stress Con Industries, Inc. Those differences are as follows:

	12/31/2001	5/25/2002	12/31/2002

Unlisted stock, Posen Construction Inc.	1,818,653.00	8,818,653.00	1,889,379.00
Unlisted stock, Stress Con Industries Inc.	815,586.00	4,815,585.00	942,178.00

Apparently, defendant added $7 million to the value of Posen Construction and $4 million to the value of Stress Con Industries. Plaintiff contends that based only on the numbers as presented in the balance sheets, defendant clearly misrepresented the value of his interests in the businesses as of May 25, 2002 because by the end of December 2002, the values of the businesses reverted back to values very similar to what they were at the end of the previous calendar year. But, importantly, the first supplement to defendant's May 25, 2002 balance sheet plainly stated that "[t]he total value of the assets of Norman F. Zapczynski are estimated and may be plus or minus approximately $4,000,000.00." Thus, defendant had put plaintiff on notice that there could be massive fluctuations in the amount of his net worth and that defendant's net worth as of May 25, 2002 was a product of defendant's estimation. Defendant testified at his deposition that he prepared his balance sheet "[g]iving the true value of what I considered my assets at the time of the marriage." At the same time, defendant explained at his deposition that he prepared the balance sheet according to "Norm's philosophy in business" which can be boiled down to "dreaming big." It is undisputed that no formal appraisals were required by plaintiff, plaintiff's counsel, or the terms of the antenuptial agreement itself. In fact, the antenuptial agreement by its own terms states that "values for many of the assets fluctuate and appraisals of the value of assets are subject to differences of opinion."

While looking at the numbers presented, defendant's estimation of the values of Posen Construction and Stress Con Industries, and consequently his own individual net worth were without a doubt overestimations. Yet, under the circumstances, they do not rise to the level of "misrepresentations . . . of material fact" as contemplated in *Reed, supra* at 142-143. Plaintiff, as the party challenging the antenuptial agreement bears the burden of proof and persuasion, *Rinvelt, supra* at 382, and she has not shown that defendant's overestimation violated some "standard[] of 'fairness.'" *Reed, supra* at 142-143. The record is clear that defendant was not required to retain a professional appraiser to value his interest in his businesses and defendant put plaintiff on notice both that his balance sheet was an estimation and also that there could be fluctuations in his valuations totaling millions of dollars. Plaintiff has provided no evidence whatsoever that defendant overestimated the values of Posen Construction and Stress Con Industries in some kind of nefarious attempt to misrepresent his net worth to plaintiff, that his estimates were not made in good faith, or that the overestimates unfairly induced her to marry defendant. As the trial court pointed out, plaintiff admitted that she did not marry defendant for his money. Plaintiff has failed to meet her burden under *Reed*. *Id*.

Furthermore, when analyzing the issue and considering the requirements that plaintiff relies on in *In re Benker's Estate*, plaintiff still has not shown error. Pursuant to *In re Benker's Estate* defendant had an "affirmative duty to disclose to the other the nature of his property interests," and that disclosure had to be "full and frank." *In re Benker's Estate, supra* at 689-690. There is no doubt that defendant fully disclosed his property interests to plaintiff. Defendant clearly was not hiding assets; to the contrary, he fully disclosed his assets and their worth as he believed it to be at the time of the execution of the antenuptial agreement. Defendant testified that when he prepared his balance sheet he believed his estimations were "100 percent truth." Plaintiff has provided no evidence that while defendant overestimated the worth of his assets, that his disclosure was not straightforward or sincere when he made it. This

Court is aware that balance sheets are financial snapshots that are by their very nature subject to change on a daily basis. Assuredly, plaintiff and her counsel were similarly well-aware. Considering all the evidence, plaintiff has presented no evidence that defendant's disclosures were not "full and frank" under the circumstances. *Id.*

B. Defendant's Interests in ZDZ Properties, LLC. and Auburn Rental Company

Plaintiff asserts in her brief on appeal that defendant failed to disclose his interests in ZDZ Properties, LLC. and Auburn Rental Company on his May 25, 2002 balance sheet. Plaintiff does not make any assertions about the worth of defendant's interests in these companies. Instead, she merely alleges that "[n]owhere on [the] Balance Sheet was there any reference to [defendant's] interests in ZDZ Properties, LLC. and Auburn Rental Company." Defendant states that ZDZ Properties, LLC. is a real property holding company that owns the property where Stress Con Industries operates. As such, defendant states that its value was included in the value of Stress Con Industries on his balance sheet. As for Auburn Rental Company, defendant claims that it is a shell corporation that has no assets or liabilities and thus has no value to be included on defendant's balance sheet. Plaintiff, as the party challenging the antenuptial agreement bears the burden of proof and persuasion. *Rinvelt, supra* at 382. By merely mentioning in her brief on appeal that these companies did not appear on defendant's balance sheet without more does not meet her burden. *Id.*

C. Defendant's Accounts at Standard Federal Bank and UBS Paine Weber

Plaintiff alleges in a footnote in her brief on appeal that defendant failed to disclose accounts at Standard Federal Bank and UBS Paine Weber. Plaintiff does not make any assertions about these accounts. A mere glance at defendant's May 25, 2002 balance sheet shows that he did not detail out his various bank and investment accounts and instead generalized "Cash" in the amount of $1,500,000 and a "Retirement Fund - IRA" in the amount of $37,500. Plaintiff, as the party challenging the antenuptial agreement bears the burden of proof and persuasion. *Rinvelt, supra* at 382. Without any evidence, plaintiff cannot show that defendant did not include these amounts in his general categorization for cash or retirement funds. By merely mentioning in her brief on appeal that these specific accounts did not appear on defendant's balance sheet without evidence to support her claim does not meet her burden. *Id.*

D. Defendant's 1998 Cadillac and 2000 Corvette

Again, plaintiff alleges in a footnote in her brief on appeal that defendant failed to disclose a 1998 Cadillac and 2000 Corvette on his balance sheet. Defendant's May 25, 2002 balance sheet shows that defendant did not detail out his personal property. Instead defendant included a line item entitled "Personal Property" in the amount of $200,000. Plaintiff, as the party challenging the antenuptial agreement bears the burden of proof and persuasion. *Rinvelt, supra* at 382. Without any evidence, plaintiff cannot show that defendant did not include the value of these cars in the amount he labeled "Personal Property." By merely mentioning in her brief on appeal that the cars did not appear on defendant's balance sheet without evidence to support her claim does not meet her burden. *Id.* Moreover, plaintiff admitted at deposition that she knew defendant owned "cars" before she married him. Furthermore, plaintiff admitted that she owned a 1999 Cadillac during the antenuptial agreement negotiations and that it did not

appear on her balance sheet. She testified that she had included it as part of the lone $700,000 cash asset on her balance sheet. Plaintiff has not established error.

E. Conclusion

Plaintiff did not establish a justiciable question of fact regarding defendant's responsibility to fully and frankly disclose his net worth to plaintiff incident to the parties' negotiation and execution of their antenuptial agreement and thus the trial court did not err when it granted partial summary disposition in favor of defendant. We further conclude that the trial court properly upheld the validity of the antenuptial agreement because defendant's good faith overestimate of the value of Posen Construction and Stress Con Industries and resultantly his net worth did not result in a material misrepresentation that deprived plaintiff her ability to rely on the balance sheet during negotiations or dispossessed her of her ability to fully and fairly participate in the negotiation process. For all of these reasons, we thus conclude that the trial court did not err when it concluded that the parties' antenuptial agreement is valid and enforceable.

III

Next, plaintiff contends that assuming arguendo that the parties' antenuptial agreement is valid, the trial court erred at trial when it interpreted the provision in the agreement relative to the distribution of assets acquired during the marriage from defendant's income, and consequently, the trial court failed to equitably divide such assets. Defendant responds that the trial court properly determined that, by the plain terms of the parties' antenuptial agreement, all income acquired by defendant during the marriage was his separate property. Antenuptial agreements are interpreted according to the rules of construction applicable to contracts in general. *Reed, supra* at 144; *In re Hepinstall's Estate*, 323 Mich 322, 327-328; 35 NW2d 276 (1948). Contract interpretation involves issues of law that we review de novo. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000).

> "Antenuptial agreements, like other written contracts, are matters of agreement by the parties, and the function of the court is to determine what the agreement is and enforce it. Clear and unambiguous language may [not be] rewritten under the guise of interpretation; rather, contract terms must be strictly enforced as written, and unambiguous terms must be construed according to their plain and ordinary meaning." [*Reed, supra* at 144 (citation omitted.)]

When interpreting a contract, the cardinal rule is to first ascertain the intent of the parties. *Klapp v United Ins Group Agency*, 468 Mich 459, 475; 663 NW2d 447 (2003). This Court reads the agreement as a whole and attempts to apply the plain language of the contract itself to enforce the parties' intent. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000).

At issue here is Section 5 of the antenuptial agreement entitled "Retention of Separate Property." It states as follows:

> A. Each party shall, except as otherwise provided, during his or her remaining lifetime retain the sole ownership of all of his or her respective SEPARATE PROPERTY and shall have the exclusive right to dispose of any and all such

separate property during his or her lifetime by inter vivos transfer or testamentary direction or by any and all other disposition and/or to encumber, pledge or to sell or transfer the same without any interference by or the necessity of the joinder of the other in such manner as shall be determined in the sole discretion of such owner thereof and as if the aforesaid marriage had not taken place.

B. For all purposes of the Agreement as used herein, the term "Separate property" shall mean with respect to a party hereto all of such party's right, title and interest, legal or beneficial, in and to any and all property and interest in property, real, personal or mixed, wherever situated and regardless of how titled which each of the parties owned or had a beneficial interest in at the time of the marriage as set forth and delineated on Exhibits "1" and "2" attached hereto.

C. "Separate Property" shall also mean:

i. Any increase or appreciation in value of such property, whether the increase, appreciation or enhancement is due to market conditions or to the services, skills, efforts, or payments made by either of the parties; and

ii. All property acquired hereafter by either party out of the income or proceeds from the sale, transfer, or mortgaging or use of any such Separate Property.

The trial court interpreted Section 5 C ii of the agreement to mean that all income defendant earned from employment or all income defendant derived from a business during the marriage is the separate property of defendant. The trial court stated as follows in its oral opinion in the matter:

> The Court is also finding specifically, and I want to go into as – so finding on this particular matter, and that would be five – this would be 5C2, specifically little [i], I guess two little [i], that's what you have to say, and this would be on page four, number 10: All property acquired hereafter by either party out of the income or proceeds. Now, income or proceeds. Why would you use two words if you wanted to only use one? You could have said income from the sale and blah, blah, blah or you could say proceeds from the sale. It would mean exactly the same thing. But this language doesn't say that. It says income or proceeds. This Court is finding that the premarital agreement barred either distribution by the Court of income that was gained by separate property, and they went through the – and I'm finding that the income from the separate property has been stated in the testimony on line seven, or whatever line that was, where it was from the distribution of a particular – I know that's income. But, however, in this contract it's barring a distribution of that income, and that income, plus the proceeds now, income or proceeds from the sale, mortgage and so forth and so on go to the person.

> It's the same thing on [plaintiff's] property and so forth. She earned interest, she earned whatever she earned over the time of the matter. That all goes to her. It doesn't go to him. It's the same thing that goes to him. And I'm finding that that goes to him in this particular matter.

As of result of the trial court's interpretation of the contract, the Judgment of Divorce is silent on income defendant earned from employment during the marriage.

Again, the specific section of the antenuptial agreement at issue is Section 5 C ii which states that, "All property acquired hereafter by either party out of the income or proceeds from the sale, transfer, or mortgaging or use of any such Separate Property." It appears that the trial court read the section to mean "all income earned by either party during the marriage" is separate property. But the plain language of the section does not say that. A close review of the trial court's interpretation reveals that the trial court's reading of the section is entirely inconsistent with the plain language of Section 5 C ii because the section specifically provides that income is "Separate Property" only when it comes from the "sale, transfer, or mortgaging or use" of "Separate Property." The trial court's interpretation was error because, in effect, the trial court rewrote the terms of the antenuptial agreement instead of strictly enforcing the unambiguous contract terms as written according to their plain and ordinary meaning. *Reed*, *supra* at 144. Therefore, we agree with plaintiff's assertion that the trial court erred in its income interpretation. Income earned from employment or income earned and distributed to the party or income earned from a business but wrongfully withheld from distribution during the marriage was not exempt from the marital estate as separate property pursuant to Section 5 C ii of the antenuptial agreement.

As a result, we reverse the trial court's decision to the extent it involves its interpretation of Section 5 C ii of the antenuptial agreement that income earned from employment or income earned from a business during the marriage qualified as "Separate Property" pursuant to the agreement. We remand the issue to the trial court to revisit the issue of income earned from employment or income earned from a business during the marriage as part of the marital estate, and, to make an appropriate dispositional ruling regarding the income. *Vander Veen v Vander Veen*, 229 Mich App 108, 110; 580 NW2d 924 (1998) (the "marital estate" consists of those assets "earned or acquired" by a spouse during the marriage.) We do note that the parties' joint tax returns for the years 2003 through 2005 are part of the lower court record and indicate that defendant earned income from employment and income from a business during the marriage. In other words, because the antenuptial agreement does not provide that income earned from employment or income earned from a business during the marriage is the separate property of the party receiving the income, on remand, unless shown otherwise, the trial court should not consider these earnings subject to Section 5 C ii of the antenuptial agreement and should make an appropriate dispositional ruling from the resultant income. On remand, to the extent that such income was still existent in some form or account other than bank accounts that were divided by the trial court at the time of divorce, the income in whatever form would constitute part of the marital estate subject to equitable division between the parties. The burden of proof would still require plaintiff to establish to the court, by evidence, the amount or value of the income not already divided.

IV

On cross-appeal, defendant argues that the trial court erred when it awarded plaintiff $100,000 representing 50% of the increase in the value of the marital home during the parties marriage because the marital home is defendant's separate property, and also, there was no evidence that the marital home increased in value during the marriage. Defendant also asserts that the trial court erred in awarding plaintiff the company 2001 Jaguar XKR because the evidence established that the vehicle belonged to Posen Construction.

Again, antenuptial agreements are interpreted according to the rules of construction applicable to contracts in general. *Reed, supra* at 144; *In re Hepinstall's Estate, supra* at 327-328. Contract interpretation involves issues of law that we review de novo. *Sands Appliance Services, Inc, supra* at 238. "Unlike the findings of a jury, which are binding in the sense that all inferences in favor of the prevailing party must be accepted, a trial court's factual conclusions in a divorce action are only presumptively correct. However, the burden is on the appellant to persuade the reviewing court that a mistake has been committed, failing which the appellate court may not overturn the trial court's findings." *Beason v Beason,* 435 Mich 791, 804; 460 NW2d 207 (1990) citing 9 Wright & Miller, Federal Practice & Procedure, § 2585, p. 729.

A. Marital Home at 32857 North River Road, Harrison Township

Defendant argues that the trial court strayed from the plain terms of the prenuptial agreement between the parties when it awarded plaintiff one half of the appreciation of the Harrison Township house after specifically concluding that it was plaintiff's asset. The trial court stated as follows regarding 32857 North River Road, Harrison Township at the close of the bench trial:

> [T]he property at 32857 North River Road, the Court is finding as a fact in this case that that home was practically completed at the time of the marriage in this particular matter, that the $800,000 is a list of what it was. The contractor indicated, at that time he was paid $850,000 for his work, and the Court is finding that as a fact. That's been uncontroverted.

Then later, the trial court continued,

> I'm awarding to the defendant, along with the 32841 North River Road, along with the read property. It's got – located, they say lot 44, but that's that home that he's presently living in. I'm awarding that to the defendant. However, from what I understand in that particular matter, the home is appreciated in value about $200,000. So I'm going to award one-half of the appreciation to the plaintiff, which is $100,000.

Again, at issue here is Section 5 of the antenuptial agreement entitled "Retention of Separate Property." The plain language of Section 5 A clearly states that "[e]ach party shall, . . . during his or her remaining lifetime retain the sole ownership of all of his or her respective SEPARATE PROPERTY." Defendant included 32857 North River Road, Harrison Township on his Balance Sheet disclosure as part of the prenuptial agreement. The trial court also concluded that it was "uncontroverted" that the property was defendant's sole property and the record supports that finding. Thus, pursuant to Section 5 C i, any "increase or appreciation in value of such property, whether the increase, appreciation or enhancement is due to market

conditions or to the services, skills, efforts, or payments made by either of the parties" is also defendant's separate property. Because the trial court did not interpret the antenuptial agreement according to its plain terms, we vacate the trial court's award of half of the amount of the appreciation of the property in the amount of $100,000 because it is contrary to the plain language of the parties' antenuptial agreement.

B. 2001 Jaguar XKR

Defendant also argues that the trial court erred in awarding plaintiff the Jaguar because the record evidence established that the vehicle was titled to and was an asset of Posen Construction and it was undisputed that Posen Construction was defendant's separate asset. Plaintiff responds that the trial court properly awarded plaintiff a vehicle as part of the equitable distribution of property after determining that plaintiff regularly drove a 2001 Jaguar during the marriage. We review the findings of fact in a divorce case for clear error and then decide whether the dispositional ruling was fair and equitable in light of the facts. MCR 2.613(C); *Reed*, *supra* at 150. "The dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable." *Draggoo v Draggoo*, 223 Mich App 415, 429-430; 566 NW2d 642 (1997). "The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances." *Gates v Gates*, 256 Mich App 420, 423; 664 NW2d 231 (2003).

At trial, plaintiff's testimony indicated that defendant gave plaintiff the 2001 Jaguar XKR to her for a wedding present a couple weeks after their wedding. She testified that she drove the car for about six years and that defendant did not tell her that the car was titled to Posen Construction and that she did not know that it was titled to Posen Construction. Also at trial, Loretta Syler, the controller at Posen Construction testified that the car was titled to Posen Construction but that the car was located in Florida and driven exclusively by plaintiff. At the close of the proofs in the bench trial the trial court held as follows with regard to the parties' automobiles:

> Now, there's three cars in the particular matter. I understand the issue of defining the cars, the automobiles in the particular matter, their company cars, and so forth and so on, but I am requiring that the defendant provide a vehicle to the plaintiff. I think it should be something in the nature of what they're talking about here – what was it? . . . . A Jaguar. What year is that Jaguar? . . . 2001. I think that the defendant should provide a vehicle for the [plaintiff]. That basically was their family car, as far as I can see, and that's what I'm finding in this particular matter.

Plaintiff asserts in her response brief on cross-appeal that following trial but prior to the entry of the Judgment of Divorce, the parties agreed to transfer that specific Jaguar plaintiff had been driving to her rather than engaging in further negotiations about the value of a comparable vehicle. As a result of the parties' stipulation post-trial, the judgment of divorce provided that defendant provide plaintiff with the car she customarily drove during the marriage, a 2001 Jaguar XKR. The judgment stated specifically that "[p]laintiff shall become the sole and separate owner of the 2001 Jaguar XKR automobile customarily driven by her, free and clear of any and all claims by Defendant and Posen Construction, Inc. Defendant shall forthwith take all steps necessary to transfer unencumbered ownership of this vehicle to Plaintiff."

While the trial court acknowledged that the Jaguar was indeed titled to Posen Construction, it credited plaintiff's testimony and found the vehicle was a "family car" and as a result part of the marital estate. In support of the finding that the vehicle was a family vehicle, the record reveals plaintiff's testimony that the Jaguar was a wedding present, plaintiff drove the car for six years, and the fact that the car was located in Florida where plaintiff principally resided, and the controller's testimony that it was customary for the spouses of defendant and his partner at Posen Construction to have driving privileges of company-owned automobiles of which the 2001 Jaguar XKR at issue was one. After reviewing the record, we find no clear error in the trial court's determination that the Jaguar XKR at issue constituted marital property. Although testimony from defendant's controller at Posen Construction somewhat conflicted with plaintiff's testimony about the circumstances surrounding the Jaguar, deference is given to the trial court's determination of credibility. *Draggoo, supra* at 429. Again, "[t]he goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances." *Gates, supra* at 423. Considering all the facts, the dispositional ruling to award plaintiff a family vehicle comparable to the 2001 Jaguar she drove during the marriage was fair and equitable in light of the facts. MCR 2.613(C); *Reed, supra* at 150.

V

Because the trial court did not err when it held that the antenuptial agreement was valid and enforceable we affirm in part. The trial court errantly interpreted the contract to conclude that income earned from employment or income earned from a business during the marriage was separate property pursuant to the specific terms of the antenuptial agreement, therefore we reverse in part and remand for further proceedings. Similarly, the trial court erred when it awarded plaintiff half of the amount of the appreciation of the marital home in the amount of $100,000 contrary to the plain language of the antenuptial agreement, and we vacate in part. And finally, the trial court did not err when as part of its equitable disposition of property, awarded to plaintiff a family vehicle comparable to the 2001 Jaguar, we affirm that distribution.

Affirmed in part, reversed in part, vacated in part, and remanded. We do not retain jurisdiction. Costs to neither party.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Pat M. Donofrio