IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LINDA SEVEN, Appellant, v. STOEL RIVES, LLP, an Oregon Limited Liability Partnership; GEORGE W. STEERS and LUCY STEERS, husband and wife, and the marital community comprised thereof, Individually, and GEORGE W. STEERS in his capacity as Personal Representative of the Estate of ROBERT RESOFF and as Trustee of the Shelford Family Trust, the Dean Family Trust, and the Resoff Family Trust; SUSANNA DEAN SUTTON, in her capacity as Trustee of the Resoff Testamentary Trust for the benefit of the Dean Family; ROBERT N. HOPE, in his capacity as Trustee of the Resoff Testamentary Trust for the benefit of the Resoff Family, Respondents.	)	No. 64117-4-I DIVISION ONE UNPUBLISHED FILED: December 20, 2010

Cox, J.—Linda Seven appeals two partial summary judgment orders dismissing her claims based on the alleged existence of a committed intimate relationship ("CIR") between her and Robert Resoff.[1] Specifically, she claims

[1] Our supreme court has adopted the use of the term "committed intimate relationship" for what was formerly known as a "meretricious relationship." Olver v. Fowler, 161 Wn.2d 655, 657 n.1, 168 P.3d 348 (2007). For the reasons stated in Olver, we use the same term here.

that such a relationship existed from 1993 to 2001, the year of Resoff's death. Based on the alleged existence of such a relationship, she also claims a right to profits from AAS-DMP Management ("AAS-DMP"), a joint venture in which Resoff invested funds and in which he allegedly actively participated. Because she fails in her burden to show the existence of any genuine issues of material fact and the defendants in this action are entitled to judgment as a matter of law, we affirm.

Seven and Resoff both worked in the fishing industry. In 1984, they began dating. Resoff subsequently hired Seven to be his bookkeeper.

In 1985, Seven moved into Resoff's home. She moved in and out of the home several times during the early 1990s, but returned permanently in January 1993. At that time, Resoff was experiencing health problems. They lived together from then until his death in 2001.

Resoff and Seven never married. They discussed marriage twice. The conversations took place prior to 1993 and were brief. Seven testified that she "[didn't] need to get married."

In 1992, while the couple was not living together, Resoff invested one million dollars in All Alaskan Seafoods ("AAS"), a seafood processing company, obtaining one third of the company's equity. In 1994, during his relationship with Seven, he invested another $333,333 into a joint venture between AAS and Dalmore Product, called AAS-DMP. Resoff received approximately $17.7 million in distributions from the joint venture during his lifetime.

The law firm of Stoel Rives, LLP, prepared a will for Resoff. The will appointed Seven and George Steers, a lawyer at the firm, co-executors of his estate and co-executors of his testamentary trusts. The will also left Seven a substantial amount of property. Shortly after Resoff's death, Seven asked Steers if she had any right to an additional portion of Resoff's estate because they lived together for so many years. Steers told Seven that she did not because Washington does not recognize common law marriage. It appears that they never discussed the CIR doctrine.

Seven later learned from a different attorney about the CIR doctrine. Thereafter, she resigned as co-personal representative of Resoff's estate. She commenced this action for legal malpractice, misrepresentation, breach of fiduciary duty, and recovery of property against Stoel Rives, Steers, and the trustees of Resoff's testamentary trusts (collectively "Stoel Rives"). She sought damages and an equitable portion of several of the trusts.

Stoel Rives made two motions for partial summary judgment: that Seven and Resoff did not have a CIR and that AAS-DMP was Resoff's separate property. The court granted them both.

Seven appeals.

COMMITTED INTIMATE RELATIONSHIP

Seven argues that she established the existence of genuine issues of material fact that she and Resoff had a CIR from 1993 to 2001. We disagree.

A motion for summary judgment may be granted when there is no genuine

issue as to any material fact and the moving party is entitled to a judgment as a matter of law.[2] A genuine issue is one on which reasonable minds may differ.[3] A material fact is one on which the outcome of the litigation depends.[4]

When a defendant moves for summary judgment, it bears the initial burden of showing the absence of an issue of material fact.[5] If a defendant makes that initial showing, then the burden shifts to the plaintiff to establish that there is a genuine issue of material fact.[6] The plaintiff may not rely on speculation or on having her own affidavits accepted at face value.[7] She must put forth specific facts showing the existence of a triable issue.[8]

> If . . . the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," then the trial court should grant the motion. . . . "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."[9]

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[2] CR 56.

[3] Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

[4] Atherton Condo. Apt.-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990) (citing Morris v. McNicol, 83 Wn.2d 491, 494, 519 P.2d 7 (1974)).

[5] Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

[6] Id.

[7] Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

[8] Id.

[9] Young, 112 Wn.2d at 225 (quoting Celotex Corp. v. Catrett, 477 U.S.

We review de novo a trial court's order granting summary judgment, taking all facts and inferences in the light most favorable to the nonmoving party.[10]

A CIR is a "stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist."[11] The CIR doctrine evolved to protect unmarried parties who acquire property during their relationships "'***so that one party is not unjustly enriched*** at the end of such a relationship.'"[12] Under Connell v. Francisco,[13] relevant factors to determine whether a CIR exists "***include, but are not limited to***: continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties."[14] These factors are "neither exclusive nor hypertechnical. Rather, [they] are meant to reach all relevant evidence helpful in establishing whether a [CIR] exists."[15] Accordingly,

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317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

[10] Estate of Haselwood v. Bremerton Ice Arena, Inc., 166 Wn.2d 489, 497, 210 P.3d 308 (2009) (citing Biggers v. City of Bainbridge Island, 162 Wn.2d 683, 693, 169 P.3d 14 (2007)).

[11] Connell v. Francisco, 127 Wn.2d 339, 346, 898 P.2d 831 (1995) (citing In re Marriage of Lindsey, 101 Wn.2d 299, 304, 678 P.2d 328 (1984)).

[12] In re Marriage of Pennington, 142 Wn.2d 592, 602, 14 P.3d 764 (2000).

[13] 127 Wn.2d 339, 898 P.2d 831 (1995).

[14] Id. at 346 (emphasis added).

[15] Pennington, 142 Wn.2d at 602.

"whether relationships are properly characterized as [CIRs] depends upon the facts of each case."[16]

Here, the parties agree that three of the above factors are satisfied: continuity of cohabitation, duration of the relationship, and purpose of the relationship.[17] We accept this legal concession by Stoel Rives for purposes of this appeal. Thus, the question is whether Seven showed the existence of any genuine issue of material fact for the remaining factors: pooling of resources and services for joint projects or mutual intent of the parties.

Pooling of Resources and Services for Joint Projects

Under In re Marriage of Pennington,[18] which applies the Connell factors, the pooling factor is satisfied if the parties "jointly invested their time, effort, or financial resources in any specific asset to justify the equitable division of the parties' property acquired during the course of their relationship."[19] In that case, the court considered two different relationships and found that neither satisfied the pooling factor.[20]

The first relationship was between Clark Pennington and Evelyn Van

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[16] Id. (citing In re Meretricious Relationship of Sutton, 85 Wn. App. 487, 490, 933 P.2d 1069 (1997)).

[17] Brief of Respondents at 24.

[18] 142 Wn.2d 592, 14 P.3d 764 (2000).

[19] Id. at 605.

[20] Id. at 605, 607.

Pevenage.[21] Van Pevenage presented evidence that the parties shared some living expenses and that she cooked meals, cleaned the house, and helped with interior decoration.[22] But, she presented "no evidence to suggest she made constant or continuous payments [or] jointly or substantially invested her time and effort into any specific asset so as to create any inequities."[23] This lack of evidence to show a significant pooling of resources for joint projects was critical to the court's determination that the pooling factor was not satisfied.

The second relationship was between James Nash and Diana Chesterfield.[24] Nash and Chesterfield had a joint bank account for living expenses and shared mortgage payments, but maintained separate bank accounts, contributed to separate retirement plans, and purchased no property jointly.[25] The court held that the evidence did "not fully establish the parties jointly pooled their time, effort, or financial resources enough to require an equitable distribution of property. . . ."[26] This failure was fatal for purposes of satisfying the pooling factor.

Here, Stoel Rives provided evidence that Seven and Resoff did not pool

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[21] Id. at 595.

[22] Id. at 604.

[23] Id. at 605.

[24] Id. at 597.

[25] Id. at 606-07.

[26] Id. at 607.

any resources for joint projects. They had no joint bank accounts at any time during their relationship. They made independent estate plans and filed separate tax returns. Significantly, there was no evidence that they ever made any joint investments, either in AAS or AAS-DMP. Nor is there evidence that they made any other joint investments. Moreover, there was undisputed evidence that Seven made separate investments, which she meticulously tracked and kept separate. With the exception of minor entertainment expenses and some furniture, Resoff paid for all household expenses. Seven ran errands and took care of their household. Seven received reimbursement from Resoff for any amounts she spent. There was no evidence that the accounts to which she had access contained any of her own funds.

Seven bore the burden to point to specific evidence creating a genuine issue of material fact concerning this factor. She failed to do so.

Seven argues that her contribution of services, including "caring for Bob and the household, nursing him in illness and running errands" should satisfy this factor. A close reading of Pennington suggests that providing services to the alleged CIR, without more, is insufficient to satisfy the pooling factor.[27] In any event, there is undisputed evidence that Resoff paid Seven for those services.

Seven testified that she negotiated a raise with Resoff based on her additional performance of substantially the same services:

Q. August 26, 1991, told Bob you want a raise?

[27] Id. at 604-07.

> A. Oh, yes.
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> Q. Describe for me that one, if you remember.
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> A. I told - - I think I told him that a lot of time had gone by since I first moved in, and I was doing more and more and more and, you know, I - -
> . . . .
>
> Q. What kinds of more and more and more? Just give me a feel for what it was like?
> . . . .
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> A. Oh, on a typical day, ***cook for him, do laundry, do groceries, get groceries, get his dry cleaning, take his car into the shop***, you know.[28]

As a result of this conversation, Resoff raised Seven's salary from $36,000 per year to $50,000 per year. In addition to this salary, Seven also paid no living expenses. Because Seven was compensated for the services she provided during the relevant time period and does not claim the compensation was inadequate, there is no evidence of unjust enrichment.

Accordingly, Seven failed in her burden to show that there was a genuine issue of material fact for trial respecting the pooling factor for a CIR.

Seven argues that it made no sense for she and Resoff to pool their resources because Resoff was worth so much more and would not let her pay for anything. But motivation for assuming payment of all obligations of the relationship is irrelevant to the question of pooling. Rather, it is the fact of pooling that the courts require as one of the Connell factors. Only then is the underlying rational for the CIR doctrine—to deter unjust enrichment—satisfied.

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[28] Clerk's Papers at 95-96 (emphasis added).

Mutual Intent of the Parties

In Pennington, the court explained that Connell contemplates that the "intent" factor is satisfied by the mutual intent of the parties to be in a CIR.[29] Even so, the factor is unclear: "[Connell] does not seem to give any indication of what kind of 'intent' is involved. Is it intent to live together as if married, intent to share property, intent to not share property, or what?"[30] Here, the trial court also struggled to interpret this factor, but finally decided that the required intent was not present.

In Pennington, the court held that neither couple presented evidence that satisfied the intent factor.[31] One party in each couple was married to another person during their relationship.[32] Van Pevenage refused to marry Pennington after his divorce and Chesterfield and Nash never held themselves out as husband and wife.[33] The supreme court held that these actions contradicted any argument that the parties had a mutual intent to be in a CIR.[34]

Here, Seven testified that she intended to be in a CIR with Resoff:

> I intended throughout 1993 until the date of Bob's death to be with him at all times and to be, with the exception of a marriage license,

[29] Pennington, 142 Wn.2d at 604.

[30] 21 Kenneth W. Weber, Washington Practice: Family and Community Property Law § 57.8, at 340 (1997).

[31] Pennington, 142 Wn.2d at 604, 606.

[32] Id.

[33] Id.

[34] Id.

> in essence his spouse.
> . . . .
>
> We considered ourselves a couple, in essence, a husband and wife lacking only a marriage certificate . . . . I was more than content in the relationship that we had, which I considered exactly like a marriage.[35]

We assume, without deciding, that Seven's testimony shows her intent to be in a CIR for the relevant period beginning in January 1993. The question then becomes whether she demonstrated the existence of any genuine issue of material fact as to Resoff's intent to be in a CIR.

Seven presented evidence that in 1990, Resoff requested that their golf cards at the Fairwood Golf Course be in the name of Mr. and Mrs. Resoff. Because this request was made before January 1993, it is not relevant to the period of our inquiry. Seven testified that Resoff made a similar request to a golf club in Indian Wells, California, but she did not specify when that request was made. Also, Lloyd Cannon, Chairman of AAS, testified that he heard Resoff refer to Seven as his wife "several times." He did not indicate when these instances occurred. Because no dates are specified for those events, it is unclear if Resoff referred to Seven as his wife after January 1993, the beginning of the relevant period for this appeal. In any event, this evidence points to a marital relationship that did not exist, not a CIR.

In 1999, Resoff met with his attorney and took notes that included the following notation: "prenuptial . . . . seper [sic] counsel, talk to Linda." Seven

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[35] Clerk's Papers at 1202, 1206.

argues that this is also evidence of Resoff's intent to be in a CIR. However, Seven testified that Resoff never mentioned a prenuptial agreement to her. Resoff's failure to ask her about a prenuptial agreement undermines the contention that he intended to be in a CIR.

We also note, although neither party has addressed the point, that the testamentary intent of Resoff, as expressed in his will, similarly undercuts the existence of a CIR during the relevant period. Resoff bequeathed to Seven a generous amount of property in his will, including personal property; his Seattle home in which they had lived together; another residence in Palm Springs, California; and golf club memberships in Washington and California. The will also left her $500,000 in cash, an annuity of $8,333.33 each month for the lesser of ten years or her lifetime, and $50,000 for serving as his personal representative in the first year after his death. These bequests do not appear to be the type that would be made to a spouse-like partner. If there is evidence in the record of Resoff's intent to take care of Seven during her lifetime, it appears to be something less than the intent to be in a CIR or a marital-like relationship.

At best, taking the evidence in the light most favorable to Seven, the non-moving party, there is a factual issue. However, she has not met her burden to show that there is a genuine issue of material fact regarding Resoff's intent to be in a CIR because she failed to present evidence of the pooling factor discussed above. Because that essential element of a CIR was not established, all other factual disputes are rendered immaterial.

In sum, Seven failed to meet her burden to show that there is a genuine issue of material fact for the pooling factor. Although the five factors in Connell are not meant to be exclusive, they are each essential elements of a CIR.[36] Summary judgment was proper.

Seven argues that the issue of whether there is a CIR should be decided by a jury. She relies on Brust v. Newton[37] to argue that the trial court erred in finding there was no CIR because it improperly placed itself in the shoes of the jury. We are unpersuaded by this argument.

Brust is distinguishable because that case was not decided on summary judgment, but after a full trial on the merits.[38] Nothing in that case states or suggests that the normal rules for summary judgment do not apply here.

Brust involved a legal malpractice claim for the negligent drafting of a prenuptial agreement.[39] There, the trial court withheld the issues of proximate cause and damages from the jury because dissolution actions can only be heard by a judge.[40] On appeal, this court held that it was improper to withhold the issues from the jury because "a suit alleging negligence by an attorney in

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[36] Vasquez v. Hawthorne, 145 Wn.2d 103, 108, 33 P.3d 735 (2001); Connell, 127 Wn.2d at 346.

[37] 70 Wn. App. 286, 852 P.2d 1092 (1993).

[38] Id. at 288-89.

[39] Id. at 288.

[40] Id. at 290.

drafting a prenuptial agreement is not a dissolution action[, but] an action in tort."[41]

In contrast, this case is here on review of a partial summary judgment order. It is not uncommon that underlying issues of law are decided on summary judgment in a legal malpractice claim.[42] Additionally, the issue before this court is whether or not there was a CIR, not whether Stoel Rives was negligent. As such, Seven's reliance on Brust is unpersuasive.

Seven also relies on Vasquez v. Hawthorne[43] for the proposition that "determination of a committed intimate relationship is an equitable inquiry and can seldom be resolved on summary judgment."[44] However, Vasquez did not hold that determination of a CIR can never be made on summary judgment. Summary judgment was inappropriate in that case because there were genuine issues of material fact such that the plaintiff was not entitled to judgment as a matter of law. As Pennington states, the determination whether a CIR exists

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[41] Id. at 291.

[42] See Estep v. Hamilton, 148 Wn. App. 246, 201 P.3d 331 (2008), review denied, 166 Wn.2d 1027 (2009) (trial court properly granted summary judgment where plaintiff failed to show that alleged negligence proximately caused damage); Powell v. Associated Counsel for Accused, 146 Wn. App. 242, 191 P.3d 896 (2008) (trial court properly granted summary judgment to defendant where plaintiff could not show damage resulting from alleged attorney negligence); Griswold v. Kilpatrick, 107 Wn. App. 757, 27 P.3d 246 (2001) (summary judgment for attorney appropriate where former client failed to demonstrate that attorney's delay resulted in a lesser settlement amount).

[43] 145 Wn.2d 103, 33 P.3d 735 (2001).

[44] Brief of Appellant at 17.

depends on analysis of the facts of each case.

Here, Seven has not shown that any genuine issues of material fact exist. Stoel Rives is entitled to judgment as a matter of law.

Seven argues Connell does not require that all factors be met and, taken as a whole, the evidence presents issues of material fact whether there was a CIR. This is an incorrect reading of Connell, which holds that the factors "***include, but are not limited to***: continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties."[45] The word "include" means that these are the minimum requirements. The supreme court reiterated that in Vasquez, holding that the factors "are ***not exclusive***, but are intended to reach all relevant evidence."[46] The supreme court has never held that there was a CIR in the absence of one of the Connell factors.

Even viewing the evidence in its entirety, there still is no CIR. Seven presented no evidence that Resoff was unjustly enriched as a result of the property and services she contributed to the relationship. Rather, the evidence shows that Resoff and Seven were a loving, committed couple who purposely remained unmarried and diligently kept their financial assets segregated. Moreover, Seven was adequately compensated for the services she performed for Resoff. At the end of his life, Resoff left Seven a generous amount of

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[45] Connell, 127 Wn.2d at 346.

[46] Vasquez, 145 Wn.2d at 108 (emphasis added).

property. Taking the evidence as a whole, there are no genuine issues of material fact.

CHARACTER OF INVESTMENT IN AAS-DMP

Seven next argues that the trial court erred in finding that she was not entitled to an equitable share of Resoff's investment in AAS-DMP. We disagree.

A trial court disposes of property by (1) determining whether a CIR existed, (2) evaluating each party's interest in the property acquired during the relationship, and (3) making a just and equitable distribution of their property.[47] Thus, the absence of a CIR precludes inquiry into the characterization of property.

At the end of a CIR, only property that would be characterized as community property if the couple were married is subject to division by the court when the relationship ends.[48] The parties' separate property is not before the court for distribution and there is a presumption that any increase in the value of separate property during the relationship remains separate.[49] A party may rebut that presumption by showing that the increase in value is attributable to community contributions, either labor or funds.[50] The burden then shifts to the owner of the separate property to show that the increase was not attributable to

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[47] Pennington, 142 Wn.2d at 602.

[48] Soltero v. Wimer, 159 Wn.2d 428, 435, 150 P.3d 552 (2007) (citing Connell, 127 Wn.2d at 351-52).

[49] In re Marriage of Lindemann, 92 Wn. App. 64, 69, 960 P.2d 966 (1998).

[50] Id. at 69-70.

community contributions, "but rather to rents, issues and profits or other qualities inherent in the business."[51]

In any event, Seven failed to show that there were any genuine issues of material fact as to the character of AAS-DMP because she did not establish a CIR between her and Resoff.

Seven argues that she presented evidence to overcome the presumption that Resoff's investment in AAS-DMP was separate property. Lloyd Cannon, Chairman of AAS, and Jeff DeBell, Secretary of AAS, both testified that Resoff's community-like labor increased the value of AAS-DMP. Seven also argues that the original investment was community-like property because Resoff routed the money through the same account used to pay household expenses. Seven presented no evidence that she contributed any money to this account, to change its character from separate to community-like. Finally, Seven argues that she contributed her own services to AAS-DMP by taking care of Resoff. Even if we assume that Seven's services were contributed to AAS-DMP, she was adequately compensated for those services by the salary Resoff paid her.

Alternatively, Seven argues that Stoel Rives had the burden to present evidence that the increase in the value of AAS-DMP was separate property. However, because there is a presumption that the increase in value is separate,[52] the burden was on Seven to show a genuine issue of material fact.

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[51] Id. at 70.

[52] Id. at 69.

At best, taking the evidence in the light most favorable to Seven, the non-moving party, there is a factual issue about the character of Resoff's investment in AAS-DMP. But it is not material because Seven failed to establish that she and Resoff had a CIR. Therefore, summary judgment on this issue was proper.

Seven contends that Toivonen v. Toivonen,[53] Koher v. Morgan,[54] and In re Marriage of Lindemann[55] are persuasive. In each of these cases, either a CIR or a marriage existed between the parties.[56] Because Seven failed to establish a CIR, these cases are not persuasive.

We affirm the summary judgment orders.

Cox, J.

WE CONCUR:

[53] 196 Wash. 636, 84 P.2d 128 (1938).

[54] 93 Wn. App. 398, 968 P.2d 920 (1998).

[55] 92 Wn. App. 64, 960 P.2d 966 (1998).

[56] Toivonen, 196 Wash. at 637; Koher, 93 Wn. App. at 400; Lindemann, 92 Wn. App. at 67-68.