

STATE OF MICHIGAN
IN THE 6TH JUDICIAL CIRCUIT FOR THE COUNTY OF OAKLAND

FAMILY COURT DIVISION

██████████,
Plaintiff,

Honorable Elizabeth Pezzetti
Case No. 2011-██████████-DO

-v-

██████████,
Defendant.

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PLAINTIFF-HUSBAND'S MOTION FOR SUMMARY DISPOSITION

NOW COMES your Plaintiff, ██████████, by and through his attorneys, KARLSTROM COONEY, LLP, and moves this Court for summary disposition pursuant to MCR 2.116 (C) (8) and (10), and MCLA 577.28. In support of his motion, Plaintiff (Husband hereafter) states the following:

1. The parties were married on 07/██████/2009.
2. A prenuptial agreement was executed by the parties on or about 07/██████/2009, two days prior to the nuptials.
3. Each party was represented by legal counsel in the drafting, assessment, evaluation, and execution of the prenuptial agreement: Husband was represented by the undersigned law firm; Wife was represented by Clarkston Attorney W. ██████████.

4. Each party disclosed all their assets to the other party at the time the prenuptial agreement was executed; each party signed financial condition statements and/or a schedule of assets attached to the prenuptial agreement.
5. On its face, the prenuptial agreement is valid, equitable, and binding on the parties hereto thus, Husband now seeks enforcement of the agreement.
6. Discovery closed in the divorce proceeding on 01/06/2012, pursuant to this Court's scheduling order.
7. Trial in this case is scheduled for trial on 01/30/2012.
8. All relevant documents supporting Husband's dispositive motion are attached to the memorandum of law accompanying this motion.
9. This dispositive motion is further supported by the facts and authorities set forth in the memorandum of law attached hereto and made a part of this motion by reference.

WHEREFORE, your Plaintiff respectfully requests that this Court enter an order with the following relief in this divorce proceeding:

- A. Enter an order finding the prenuptial agreement valid and granting summary disposition as to the validity and enforceability of the prenuptial agreement;
- B. Proceed with the scheduled trial on 01/30/2012 for entry of the Judgment of Divorce pursuant to the Prenuptial Agreement ; and
- C. Order such other relief as this Court deem appropriate under the circumstances of this case.

Respectfully submitted,

/s/ Peter M. Keenan
KARLSTROM COONEY, LLP
By: Peter M. Keenan (P15789)
Timothy P. Flynn (P42201)

STATE OF MICHIGAN
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MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION

Introduction.

The parties to this divorce proceeding were married on 07/████/2009; Plaintiff-Husband, ██████████, is 62; his wife, the Defendant, ██████████, is 52; their marriage has lasted just over two years. A prenuptial agreement, which is the subject of this dispositive motion, was executed two days prior to the parties' nuptials. The prenuptial agreement is attached hereto at **Exhibit A.**

Under the terms of this valid prenuptial agreement, specifically §3, the parties are expressly awarded their separate property, as referenced in the respective financial statements attached to the at-issue agreement. The prenuptial agreement also bars alimony, which bar is equitable and in accord with the legal authority in Michigan considering the very short duration of this marriage [24 months to date of Divorce Complaint] and Defendant's consistent income

prior to, and during the marriage. Therefore, Husband seeks enforcement of the prenuptial agreement through the dispositive ruling of this Court. Wife asserted the possibility of legal challenges to the validity of this Agreement, but failed to submit any factual allegations as required during discovery.

The Pleadings and Procedural Summary.

Husband filed for divorce on or about 07/█/2011; the complaint for divorce is attached hereto at **Exhibit B**. At paragraph #8 of the complaint, Husband alleges the proper execution of a prenuptial agreement. The divorce complaint requests relief in the form of a judgment of divorce consistent with the agreement.

In her answer, Wife's attorney admitted the prenuptial agreement was executed and that it "speaks for itself". Wife asserted generally that the agreement is void or voidable; a conclusory pleading, contrary to requirements of MCR 2.111(D) and (F)(3)(a). Also, Wife denied, subject to discovery, independent representation by legal counsel in the review and execution of the prenuptial agreement.

In this divorce proceeding, Wife retained attorney █ who moved this Court for attorney fees in the amount of \$7500. This Court denied Wife's motion for attorney fees and entered a scheduling order, attached hereto at **Exhibit C**. Under the terms of this Court's scheduling order, discovery closed on 01/06/2012. Wife's responsive pleadings and motion for interim attorney fees, state intent to investigate through discovery the possibility of legal challenges to the Prenuptial Agreement, to wit:

- Wife was not, in fact, represented by independent legal counsel on the prenuptial agreement;

- Wife's prenuptial legal counsel, recommended by Husband, was somehow tainted by a conflict of interest, the specific nature of which is unnamed in Defendant's pleadings and undeveloped in the discovery period provided by this Court;
- Wife was coerced and battered by her husband prior to executing the prenuptial agreement, the specifics of which remain a complete mystery to Husband, and to this Court, upon the close of discovery;
- Husband failed to disclose all his assets in the prenuptial agreement; and
- The agreement is void or voidable for legal or equitable reasons, including Wife's purported change in circumstances and detrimental reliance on the prenuptial agreement.

During the discovery phase of this case, Wife conducted no discovery. She adduced no evidence in support of even the possibility of legal challenges in support of her frivolous and disparaging claims.

Further, the only specific denial, pursuant to MCR 2.111(C), of the validity of the prenuptial agreement filed by Wife is her answer to ¶8 of Husband's Complaint denying that (subject to discovery) she was represented by independently retained counsel. Wife did not pursue this claim during discovery and presented no evidence to support her conclusory allegation.

In response to these self-serving and unsupported allegations, Husband has supplied this Court with the affidavits of Husband and Attorney W. [REDACTED], attached hereto at **Exhibit D**. These affidavits are a proffer of proof in support of Husband's refutation of the above imagined assertions, and in support of this motion that the at-issue prenuptial agreement was

reviewed for Wife by independent legal counsel who represented Wife's interests prior to the marriage.

This Court has scheduled trial in this matter for 01/30/2012, with mediation before Attorney Robert Badgley to be completed by 01/20/2012. Plaintiff asserts that if his dispositive motion is granted, any trial in this case will be very limited to the extent that the prenuptial agreement disposes of the significant separate property estates of the respective parties, and given the very short duration of this marriage. For this reason, Plaintiff will seek to proceed with trial on the scheduled date in the unlikely event any remaining issues do not resolve.

Relevant Terms of the Prenuptial Agreement.

The parties' prenuptial agreement, attached hereto, contains language relevant to this Court's consideration of the instant motion at paragraphs 2 [Property], 3 [Divorce] and 13 [Wife's Representations]. The plain and unambiguous language of the agreement supports Husband's motion for dispositive relief as to the property settlement.

Legal Argument.

Husband's motion for summary disposition seeking the enforcement of a prenuptial agreement should be granted where said agreement is unambiguous, it is undisputed that the parties executed the agreement prior to their nuptials, where both parties has separate legal counsel, where both parties made full disclosure of their assets, and where Wife, in challenging the agreement, developed no proofs in support of her claim(s) that the prenuptial agreement was void or voidable.

Standard of Review and Burden of Proof.

Husband's motion is brought pursuant to MCR 2.116 (C) (8) and (10). Therefore, Husband sets out both a claim-based and fact-based analysis to the simple uncontested facts of this case.

This motion triggers the standard of review for a dispositive motion brought in a divorce proceeding on the issue of the enforceability of an antenuptial agreement. This Court's

interpretation of a contract, the antenuptial agreement in the instant matter, is a question of law. Likewise, this Court's determination as to whether the terms of the contract are unambiguous is also a question of law.¹ An unambiguous contract must be enforced in accord with its provisions as a matter of law.²

MCR 2.116(C) (8) presents a claim-based motion for summary disposition, testing the legal sufficiency of Plaintiff's complaint and, in this case, the legal sufficiency of Defendant's challenges to the at-issue antenuptial agreement. As such, Plaintiff's motion is solely based on the pleadings and, "is properly granted if [the non-moving party's] claims are so clearly unenforceable as a matter of law, no factual development could establish a claim of recovery."³ All factual allegations pled in the complaint and in the responsive pleadings are considered true, as well as any reasonable inferences or conclusions that can be drawn from the pled facts, construed in the light most favorable to the nonmoving party.⁴ Mere statements of conclusions, however, unsupported by allegations of specific fact, are insufficient to establish a prima facie cause of action, or likewise, to establish responsive claims or defenses.⁵

Applying this law to the instant divorce case, Husband has affirmatively pled that a properly executed unambiguous prenuptial agreement determines the property settlement and all respective property rights of the parties herein. In response, Wife has not made any specific factual allegations to support a possible claim the agreement is void or voidable, and did not develop proofs during discovery in support of her derogatory and conclusory possible allegations

¹ *Reed v Reed*, 265 Mich App 131, 141 (2005), citing *Klap v United Insurance Group Agency*, 468 Mich 459, 463, 469 (2003).

² *Reed, supra*, citing *Wilkie v Auto Owners Ins Group*, 469 Mich 41, 51-52 (2003).

³ *Simko v Blake*, 448 Mich 648, 654 (1995), brackets supplied.

⁴ *Id.*; *Alan Custom Homes, Inc v Krol*, 256 Mich.App 505, 508 (2003); *Beaudrie v Henderson*, 465 Mich 124, 130 (2001) and MCR 2.116(G)(5).

⁵ *Churella v Pioneer State Mutual Ins Co*, 258 Mich.App 260, 272 (2003).

in this respect. Therefore Husband, having asserted a valid claim on its face, is now entitled to summary disposition as a matter of law on the issue of whether the parties executed a clear unambiguous and valid prenuptial agreement.

In addition to Plaintiff's claim-based motion, Husband also asserts that the limited facts concerning this very brief marriage, contained in the pleadings and in the affidavits attached to this motion, entitle him to summary disposition. In deciding a fact-based motion pursuant to MCR 2.116(C) (10), this Court considers the pleadings, deposition(s), and other evidence submitted in support of a claim in a light most favorable to the non-moving party; the Wife herein. Wife has failed to develop any record whatsoever in support of any possible claims that the at-issue agreement is void as a matter of law, or alternatively, is voidable based on certain possible facts to be filed upon discovery. Where the evidence produced by Wife [or not produced as in this case] fails to establish a genuine issue of material fact, as here, the moving party is entitled to a judgment as a matter of law.⁶

Husband, as the moving party, must specifically identify the undisputed factual issues and support his position with evidence. In assessing Husband's dispositive motion, this Court must consider the evidence submitted [in this case, two affidavits] in the light most favorable to the nonmoving party [i.e. the Wife], but cannot make findings of fact, or weigh credibility in deciding this motion. If Husband, as the moving party, fulfills his initial burden, then Wife, as the party in opposition to this motion must demonstrate with supporting evidence that a genuine

⁶ *Maiden v Rozwood*, 461 Mich 109, 119-120 (1999).

and material issue of disputed fact exists.⁷ In the absence of any genuine issue of material fact, Husband's motion should be granted as a matter of law.⁸

In this regard, Husband simply asserts the uncontested facts that: a) each party executed the at-issue prenuptial agreement; b) each party fully disclosed their respective properties to the other; c) each party had the benefit of separate legal counsel, and d) as conceded by Wife in her pleadings, the document "speaks for itself". A plain reading of the contract between the parties is sufficient for this Court to enforce the property division set forth therein.

The evidentiary burden of both production and persuasion lies with the party to a divorce proceeding that seeks to challenge an antenuptial agreement; the Wife in the instant case.⁹ Where, as here, a party challenging a valid and unambiguous antenuptial agreement fails to offer any evidence in support of her challenge, that party fails to meet the requisite burden and the agreement should be enforced as a matter of law.¹⁰

In the instant case, although Wife asserted the possibility of a variety of cursory, disparaging, yet wholly conclusory claims in challenge to the requested enforcement of the prenuptial agreement, she offers no proof in support of same. By contrast, Husband has offered proof that Wife was not coerced or battered in relation to the execution of the parties' agreement; that she did have separate legal counsel to assess the document; that Husband has in fact disclosed his entire estate, in all its various components, and in a schedule attached to the agreement. In addition, while Wife wanted interim attorney fees to investigate the possibility of detrimental reliance and change in position. She has presented nothing to support this possibility.

⁷ MCR 2.116(G)(3)(b); MCR 2.116(G)(4); *Reed, supra*, at p. 141, citing *Maiden, supra*, at p. 120-121, and *Skinner v Square D Co*, 445 Mich 153 (1994).

⁸ *Reed, supra*, relying on and citing to MCR 2.116(G)(4); and MCR 2.116(I)(1) and (2).

⁹ *Reed, supra*, at pp. 143-144, citing *Rinvelt v Rinvelt*, 190 Mich App 372, 382 (1991); and *In re: Benker Estate*, 416 Mich 681, 684 (1982).

¹⁰ *Reed, supra*, at p. 148.

This Court should grant Husband's dispositive motion where the evidence indicates the parties executed a valid prenuptial agreement, authorized by MCLA 557.28, to settle matters of their respective property rights prior to their marriage.

Prenuptial agreements are recognized in Michigan and expressly authorized by statute. The purpose of executing such an agreement in advance of a marriage is to allow willing parties to provide for their own financial futures and to ensure certainty should their anticipated nuptials later be terminated by divorce. Each of these legitimate goals were attained by the agreement at issue herein.

MCLA 557.28 expressly authorizes such agreements: "A contract relating to property made between persons in contemplation of marriage shall remain in full force after marriage takes place." Likewise, Michigan's "Statute of Frauds", MCLA 566.132(1) (c), requires that such agreements be in writing in order to be valid. Since a prenuptial agreement is a contract, said agreement is subject to the rules governing contracts in general. This Court cannot make a contract; it can only enforce a contract.¹¹ The existence, interpretation, and enforcement of a contract is a question of law for this Court.¹²

In the *Rinvelt* case, *supra*, the Court of Appeals addressed the issue of the enforcement of a prenuptial agreement when one party claims duress, change of circumstances, lack of legal representation, and a failure by the other party to disclose assets; claims identical to those brought by Wife in the instant case. The *Rinvelt* panel expressly upheld the enforceability of prenuptial agreements. In so holding, the *Rinvelt* panel held that the following factors must be considered in determining the enforceability of a prenuptial agreement:

1. Was the agreement obtained through fraud, duress, mistake, or misrepresentation or nondisclosure of material fact?

¹¹ *Reed, supra*, at p. 149, citing *In Re: Hepinstall's Estate*, 323 Mich 322, 327-328 (1948).

¹² *Kloian v Dominos Pizza, LLC*, 273 Mich 449, 453 (2006).

2. Was the agreement unconscionable when executed?
3. Have the facts and circumstances changed since the agreement was executed, to make its enforcement unfair and unreasonable?¹³

In her motion for attorney fees, Wife asserted that she intended to investigate the possibility that the [REDACTED] agreement was void or voidable for various reasons. She has failed to file any factual pleadings asserting these claims as required by MCR 2.111. Her failure to proceed is an admission that no such claims exist. See MCR 2.111 (E) & (F), and therefore these wholly undeveloped claims are not legal issues for this Court's determination following the completion of discovery.

By way of illustration, however, Plaintiff will briefly address the possibility of factors concerning enforceability of a prenuptial agreement. Wife has inferred, for example, that she was not represented by independent legal counsel on the Prenuptial Agreement. This claim is patently false and put to rest by the Affidavit of W [REDACTED]; the attorney that provided Ms. [REDACTED] with legal counsel relative to the execution of the prenuptial agreement. Wife has not supplied this Court with any evidence to refute Mr. [REDACTED]'s sworn Affidavit. Further, Wife acknowledged she consulted with Mr. [REDACTED] with regard to the prenuptial agreement and her legal rights flowing from that agreement. See Exhibit A, paragraph I.

Likewise, Wife's possible claim that Mr. [REDACTED] was somehow tainted in his representation of Ms. [REDACTED] by an unspecified conflict of interest is defeated by the unchallenged affidavit testimony of both Husband and Mr. [REDACTED]. Mr. [REDACTED] is not a partner or associate of the Karlstrom Cooney law firm; nor does [REDACTED] serve the firm in an "of counsel" capacity. There has been no showing whatsoever that Mr. [REDACTED] compromised Wife's rights relative to the prenuptial agreement or did anything other than vigorously represent her interests.

¹³ *Rinvelt, supra*, at pp. 379, 380.

At the close of discovery, Mr. [REDACTED]'s affidavit is sufficient [and un-refuted] evidence in support of Husband's contention in this regard.

Even if this Court found Mr. [REDACTED]'s legal representation wholly ineffective, a party's lack of legal counsel before entering into a prenuptial agreement is not a basis, by itself, for voiding an otherwise valid agreement.¹⁴ Further, Wife acknowledged by her notarized signature that she waived any possibility of a conflict of interest. See ¶21 of the prenuptial agreement, titled, "Final Representation".

Further, Wife has no possible claims she was coerced and battered by her husband prior to executing the prenuptial agreement. This disparaging and unfounded possibility of claim went wholly unsupported during the discovery in this case and is now refuted by Mr. [REDACTED]'s affidavit. Husband affirmatively avers that he did not batter or coerce his wife in any way, before, during or after the execution of the antenuptial agreement.

Interestingly, there has never been any claim leveled by Wife that she has suffered a battery at the hands of her Husband, until now. Thus, the specifics of Wife's claim in this regard remain a complete mystery to both Husband and to this Court. In order to establish duress, Wife must show the existence of coercion that is "illegal in nature, manifestly unjust, or purposefully oppressive".¹⁵ A Wife asserting the defense of duress is required to show that she was "illegally compelled or coerced to act by fear of serious injury to her person."¹⁶ The Agreement cannot be avoided on the basis of the possibility of such mysterious claims.¹⁷

¹⁴ *Reed, supra*, at p. 149.

¹⁵ *Dettloff v Dettloff*, unpublished opinion per curiam of the Court of Appeals issued 12/21/2006 (docket no. 268551).

¹⁶ *Vanheusesden v Vanheusesden*, unpublished opinion per curiam of the Court of Appeals issued 3/10/2005, (docket no. 251644).

Was the Agreement unconscionable when executed? “Unconscionability” is defined as “showing no regard for conscience; affronting the sense of justice, decency, or reasonableness.”¹⁸ An “unconscionable agreement” is defined as, “an agreement that no promisor with any sense, and not under a delusion, would make, and that no honest and fair person would accept.”¹⁹ The term “unconscionability” has been defined as, “an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party.”²⁰

In order for a contract or contract provision to be considered unconscionable, both procedural and substantive unconscionability must be present. Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance of the term. If, under a fair appraisal of the circumstances, the weaker party was free to accept or reject the term, there was no procedural unconscionability.

Substantive unconscionability exists where the challenged term is not substantively reasonable. However, a contract or contract provision is not substantively unconscionable simply because it is foolish for one party and very advantageous to the other. Instead, a term is substantively unreasonable where the inequity of the term is so extreme as to shock the conscience.²¹

The prenuptial agreement in this cause is neither procedurally nor substantively unconscionable. Each party voluntarily executed the agreement. Each party was represented by

¹⁷ Although Husband does not seek sanctions or attorney fees in this motion against Wife or her counsel, the nature of Wife’s allegations border on the frivolous within the scope and meaning of MCR 2.114; MCR 2.625(A)(2); MCLA 552.13; and MCLA 600.2591.

¹⁸ Black’s Law Dictionary 7th Ed.

¹⁹ Black’s Law Dictionary 7th Ed.

²⁰ *Tom Thamas Organization, Inc v Reliance Insurance Co*, 396 Mich 488, 601–602 (1976).

²¹ *Clark v Daimler Corp*, 268 Mich App 138, 143-144 (2005).

independent legal counsel. Each party fully disclosed their respective assets. The marriage itself was consideration for the agreement.²² Provisions in the agreement in the event of divorce provide each party retain his or her separate assets or earnings. Any jointly acquired property be divided equally. The parties negotiated and ratified the agreement with the expectation and confidence their express intent would be upheld and enforced by a court; this Court. In this cause, Wife was the captain of her own financial ship and decided her own financial destiny.²³

Similarly, Wife's possible claim that Husband failed to disclose all his assets in the prenuptial agreement is absurd. When determining whether a prenuptial agreement is valid and enforceable, fair disclosure of the property of the respective parties is required.²⁴

Mr. ██████'s affidavit provides affirmative testimony of the opposite; he fully and in good faith disclosed his entire estate for inclusion and reference in the executed prenuptial agreement. Wife fails to offer any specifics relative to what property remained undisclosed upon execution of the agreement. The simple reason for this is that such property does not exist.

Putting the matter to rest, the attached Exhibit A states the values of each party's assets. Further, attached to the prenuptial agreement is Husband's statement of financial condition and assets and schedule, dated June 30, 2009, compiled by ██████ and Company, LLC; these documents were signed by Husband.

Finally, Wife's possible claim the agreement is void or voidable for legal or equitable reasons, due to Wife's purported change in her financial circumstances is untenable. Wife has allowed discovery to lapse without filing such claim, much less providing any proof in support thereof. She has not filed a claim because she has none. Wife's pleadings admit to a marriage

²² *Kennett v McKay*, 336 Mich 28 (1953).

²³ *Reed*, *supra*, p. 146.

²⁴ *In Re: Estate of Kenneth Waller*, unpublished *per curiam* opinion of the Michigan Court of Appeals, decided 11/22/2011, (docket #300436).

of just two years; her personal income and assets have not changed during this brief two year marriage.

The first step in determining whether a change in financial or other circumstances renders an otherwise valid prenuptial agreement unenforceable is for this Court to focus on whether the changed circumstances were foreseeable when the agreement was made. Thus, for “a change of circumstances to be unanticipated, the event must not have been reasonably foreseen by the parties prior to or at the time of the making of the agreement.”²⁵ The *Reed* Court expressly held that the length or duration of the parties’ marriage is not an unforeseeable factor in contemplating a prenuptial agreement; likewise, nor is the disparate growth of the parties’ separate investments an unforeseen factor.²⁶

In the matter at bar, this Court has an even easier calculus regarding the notion of Wife’s claimed change in circumstances. The parties executed the prenuptial agreement in order to have the certainty that comes from deciding their own respective financial destinies. While the hope of the parties was to remain in a long and loving marriage, that hope has been dashed, and in relatively short order, by the swift breakdown of the marriage pled in the complaint for divorce.

The fully disclosed property gap between the parties at the time of the execution of the antenuptial agreement [i.e. ██████████ has a significantly larger estate than ██████████] remains about the same as it was two years ago. In these two years, the couple resided in Husband’s residence, as contemplated, and at no cost or expense to Wife. The parties have not had the benefit of years, or decades, in order to accumulate joint assets, or to experience a significant change in their respective properties.

²⁵ *Id.*, at p. 147, citing *Kuziemko v Kuziemko*, unpublished opinion *per curiam* of the Court of Appeals issued December 4, 2001 (Docket No. 212377).

²⁶ *Id.*

In sum, Mr. [REDACTED] has basically paid for all the couple's expenses during this brief marriage. Therefore, on such facts, as in the *Reed* case, this Court must not void the prenuptial agreement based on any possible unfounded claim by Wife that she is in a significantly different financial condition than at the time of its execution. Rather, the executed agreement controls the property division of the parties and should be enforced as contemplated.

Conclusion and Relief Requested.

The prenuptial agreement executed by the Seavers is unambiguous and therefore enforceable. Husband seeks to obtain the benefit of this bargain in the context of this divorce proceeding. He wants this Court to honor the certainty and clarity that came from the agreement of the parties. There is no factual or legal basis from which Wife can avoid this contract. Therefore the prenuptial agreement controls the property division in this case.

WHEREFORE, your Plaintiff respectfully requests that this Court enter an order setting forth the following relief:

- A. Enter an order finding the prenuptial agreement valid and granting summary disposition as to the validity and enforceability of the prenuptial agreement;
- B. Proceed with the scheduled trial on 01/30/2012, for entry of Judgment of Divorce pursuant to Prenuptial Agreement; and
- C. Order such other relief as this Court deem appropriate under the circumstances of this case.

Respectfully submitted,

/s/ Peter M. Keenan
KARLSTROM COONEY, LLP
By: Peter M. Keenan (P15789)
Timothy P. Flynn (P42201)

DATED: January 6, 2012