STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OTTAWA

FILE NO. 12-073719-DM

KELLY SUE GOEMAN
Plaintiff

Vs.

NOTICE OF OPINION AND ORDER RE:
CONTEMPT OF COURT

DANIEL JAMES GOEMAN
Defendant

Please take notice on the 10th day of September, 2015 an Opinion and Order was filed in this cause.

To:

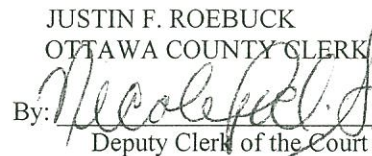
Attorney for Plaintiff
MARTIN L ROGALSKI
1881 GEORGETOWN CENTER DRIVE
JENISON MI 49428

Attorney for Defendant
JUDY E BREGMAN
PO BOX 885
GRAND HAVEN MI 49417

FOC

I hereby certify that copies of the Opinion and Order were mailed to the parties/attorneys of record in this cause on the 10th day of September, 2015.

JUSTIN F. ROEBUCK
OTTAWA COUNTY CLERK

By: 
Deputy Clerk of the Court

JFR/nap

STATE OF MICHIGAN

IN THE 20th CIRCUIT COURT FOR THE COUNTY OF OTTAWA

414 Washington Street
Grand Haven, MI 49417
616-846-8315
* * * * * * *

KELLY SUE GOEMAN,

Plaintiff,

v

DANIEL JAMES GOEMAN,

Defendant.

______________________________/

OPINION AND ORDER GRANTING OFFSET AGAINST ATTORNEY FEE JUDGMENT
File No. 12-73719-DM
Hon. Jon A. Van Allsburg

Martin L. Rogalski (P30548)
Attorney for Plaintiff

Judy E. Bregman (P32252)
Attorney for Defendant

At a session of said Court held in the Ottawa County
Courthouse in the City of Grand Haven, Michigan,
on September 10, 2015,
PRESENT: Hon. Jon A. Van Allsburg, Circuit Judge

The parties have been engaged in ongoing litigation in this high-conflict divorce case. Following several days of hearing in 2014, the court found plaintiff in contempt of court for violation of parenting time orders. On March 26, 2015, after further litigation with respect to defendant's resulting attorney fees, judgment was entered in defendant's favor in the amount of $31,351.53. The defendant filed a motion to offset obligations owed for uninsured medical expenses and taxes against this judgment. At a hearing held on July 20, 2015, the court ruled that defendant's obligation for uninsured medical expenses could not be offset against plaintiff's judgment for attorney fees, as the medical expenses are in the nature of child support, and the children's support obligations could not be offset against property and debt obligations. The Court requested briefs from the parties on the question whether defendant's tax obligation could be set off. The court received briefs from each of the parties on August 17, 2015. For the reasons stated below, the Court concludes that plaintiff is entitled to an offset against the above judgment in the amount of $12,489.40, and that her remaining obligation may be paid at the rate of $100 bi-weekly, in the form of an installment judgment.

The Consent Judgment of Divorce

The parties entered into a Consent Judgment of Divorce entered July 2, 2013. That Judgment contained a paragraph entitled "2012 Taxes," found on page 7, which stated:

> "IT IS FURTHER ORDERED AND ADJUDGED that the 2012 taxes shall be prepared by Bredeweg & Associates and shall be submitted by June 14, 2013. The parties shall equally divide all tax liability up to $10,000.00 after which Defendant shall be responsible for any liability in excess of $10,000.00."

Plaintiff asserts that her 2012 tax liability was fully satisfied by her 2012 wage withholdings, and that any further amounts paid by her on the parties' joint income tax liabilities exceed $5,000, and are therefore eligible for offset against the judgment balance she owes to the defendant. Defendant responds that the statements and pleadings of the parties, previously filed in this case, show clearly the parties' intentions with respect to the 2012 tax obligations, and support the interpretation that the equal sharing of the first $10,000 of the parties' 2012 tax liability applied only to taxes that were still owed at the time of the entry of the Consent Judgment.

Interpretation and Enforcement of a Consent Judgment

A consent judgment is the product of an agreement between the parties. *Sylvania Silica Co v Berlin Twp*, 186 Mich App 73, 75; 463 NW2d 129 (1990). In essence, an agreement to settle a pending case is a contract. *In re Robert H Draves Trust*, 298 Mich App 745, 767; 828 NW2d 83 (2012). Similarly, a divorce judgment entered by agreement of the parties represents a contract. *Rose v Rose*, 289 Mich App 45, 49; 795 NW2d 611 (2010). Divorcing parties may create enforceable contracts. *Holmes v Holmes,* 281 Mich App 575; 760 NW2d 300 (2008). Trial courts must generally uphold the validity of settlement agreements reached through negotiations and agreement by the parties to a divorce action. *Kline v Kline*, 92 Mich App 62, 71; 284 NW2d 488 (1979). Property settlement agreements are final and cannot be modified. *Zeer v Zeer*, 179 Mich App 622, 624; 446 NW2d 328 (1989).

An unambiguous contract must be enforced according to its terms. *Reed v Reed*, 265 Mich App 131, 141; 693 NW2d 825 (2005) (citations omitted). "If no reasonable person could dispute the meaning of ordinary and plain contract language, the Court must accept and enforce

contractual language as written, unless the contract is contrary to law or public policy." *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008). A clear contract is not open to judicial construction., and is "...to be construed according to its plain sense and meaning." *Grosse Pointe Park* v *Michigan Municipal Liability and Property Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005), quoting from *New Amsterdam Cas Co* v *Sokowlowski*, 374 Mich 340, 342; 132 NW2d 66 (1965).

Competent persons have the utmost liberty of contracting and their agreements voluntarily and fairly made must be held valid and enforced in the courts. *Lentz v Lentz,* 271 Mich App 465; 721 NW2d 861 (2006). Parties are free to contract as they see fit, and the courts must enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy. The judiciary may not rewrite contracts based on discerned reasonable expectations of the parties. *Burkhardt v Bailey*, 260 Mich App 636, 655-657; 680 NW2d 453 (2004), lv den 471 Mich 920; 688 NW2d 826 (2004). The actual mental processes of the contracting parties are irrelevant to the construction of contractual terms. Rather, the law presumes that the parties understood the import of a written contract and had the intention manifested by its terms. *Zurcher v Herveat*, 238 Mich App 267, 299; 605 NW2d 329 (1999).

The primary goal in the interpretation of a contract is to honor the intent of the parties. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 473; 663 NW2d 447 (2003). Contractual language may be clear and unambiguous. If so, the contract "... is to be construed according to its plain sense and meaning." *Grosse Pointe Park*, 473 Mich, at 198, quoting from *New Amsterdam Cas Co* v *Sokowlowski*, 374 Mich 340, 342; 132 NW2d 66 (1965). As a matter of law, an unambiguous contractual provision is reflective of the parties' intent. *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). Therefore, "[w]hen a contract is unambiguous, it must be enforced according to its terms." *Hamade v Sunoco Inc (R&M)*, 271 Mich App 145, 166; 721 NW2d 233 (2006).

However, if the language of the contract is ambiguous, "... testimony may be taken to explain the ambiguity." *Id.* A contract is ambiguous when its provisions can potentially have conflicting interpretations. *Klapp*, 468 Mich at 467. An ambiguity can be either patent or latent.

Shay v Aldrich, 487 Mich 648, 667; 790 NW2d 629 (2010). A patent ambiguity "appears on the face of the document, arising from the language itself, so extrinsic evidence cannot be used to identify it." *Grosse Pointe Park*, 473 Mich at 198. However, "[a] latent ambiguity ... does not readily appear in the language of a document, but instead rises from a collateral matter when the document's terms are applied or executed." *Shay*, 487 Mich at 668, quoting Black's Law Dictionary (7th Ed). Extrinsic evidence is admissible to prove the existence of a latent ambiguity because "the detection of the ambiguity requires the consideration of factors outside the document itself." *Id.* (citation omitted). To verify the latent ambiguity, the extrinsic evidence must support the argument that under the circumstances of the contract's formation, the contract's language is susceptible to more than one interpretation. *Id.*

A latent ambiguity is "latent" because it "... does not develop until we seek to apply it and then discover the equivocation." Black's Law Dictionary (7th Ed).[1] While it is not necessary to use extrinsic evidence to detect a patent ambiguity, extrinsic evidence must be used to detect a latent ambiguity because "the detection of a latent ambiguity requires a consideration of factors outside the instrument itself." *Grosse Point Park*, 473 Mich, at 198, quoting from *McCarty* v *Mercury Metalcraft Co*, 372 Mich 567, 575; 127 NW2d 340 (1964). Therefore, extrinsic evidence is admissible "... to prove the existence of the ambiguity, as well as to resolve any ambiguity proven to exist." *Grosse Point Park*, 473 Mich, at 198. "Where a latent ambiguity exists in a contract, extrinsic evidence is admissible to indicate the actual intent of the parties as an aid to the construction of the contract." *Id.* See also *Shay* v *Aldrich*, 487 Mich 648, 667-668; 790 NW2d 629 (2010).

Analysis

The use of the phrase "all tax liability" in the "2012 Taxes" paragraph of the parties' Judgment could be interpreted, using the plain language used, as "all taxes due for calendar year 2012, without consideration for prepaid or previously withheld taxes." This is the interpretation asserted by plaintiff. However, "...due regard must be had to the purpose sought to be accomplished by the parties as indicated by the language used, read in the light of the attendant

[1] Quoting Wigmore, *A Student's Textbook of the Law of Evidence* 529 (1935). A latent ambiguity "arises not upon the words of the ... instrument, as looked at in themselves, but upon those words when applied to the object or to the subject which they describe." *Hall* v *Equitable Life Assurance Society of the United States*, 295 Mich 404, 409; 295 NW 204 (1940).

facts and circumstances. Such intent when ascertained must, if possible, be given effect and must prevail as against the literal meaning of expressions used in the agreement." *Grosse Pointe Park*, 473 Mich at 200-201, quoting from *W O Barnes Co, Inc* v *Folsinski*, 337 Mich 370, 376-377; 60 NW2d 302 (1953).

On July 2, 2013, when the parties put their settlement agreement on the record in open court and entered the Consent Judgment of Divorce, both parties clearly knew that federal and state income taxes had been withheld from plaintiff's income during 2012 and were shown on her 2012 Form W-2 for that year (which was issued approximately five months prior to the entry of Judgment). If the parties had intended to include her previously withheld income in 2012 in determining her share of the liability for 2012 taxes, they would have acknowledged her pre-existing withholdings, and the language of the Judgment would have stated that her obligation toward 2012 taxes was satisfied.[2] They did not make that acknowledgement. It would have been a simple matter to state in the Judgment the amount of any withheld taxes for which plaintiff was to receive credit toward her $5,000 obligation, as that number was then known to the parties. The failure to note such a credit indicates that it was not intended.

At the hearing on July 2, 2013 at which the parties settled the divorce action, a dispute arose over whether plaintiff's liability for 2012 taxes was to be capped at $5,000, *inclusive* of post-judgment penalties and interest, or whether her liability was $5,000, *plus* any post-judgment penalties and interest which might accrue on that obligation. The dispute arose because, as Plaintiff's counsel made clear on the record, plaintiff would be paying her liability in a payment plan, rather than by a lump sum payment. The Court resolved the dispute by ruling that the parties' mediation agreement specified only the $5,000 cap, and that any post-judgment penalties and interest were speculative, and should be reserved for post-judgment motion, if necessary. (Transcript, p. 4-8). This clearly indicates the parties' intention that plaintiff assume responsibility for a $5,000 *post-Judgment* contribution to the 2012 taxes.

[2] The parties do not dispute that in 2012, plaintiff's W-2 gross income was reduced by $3,735 in withheld federal income taxes, and $1,698 in withheld state income taxes, totaling $5,433.

This conclusion is further supported by the fact that the parties specifically litigated the issue whether they would file joint 2012 income tax returns while the divorce was pending. Following a hearing, the Court entered an Order on April 10, 2013, stating:

> "1. The Parties are not required to file joint income tax returns for 2012.
> 2. If the Parties wish, they may file separate income tax returns for 2012. In the event they do so, Plaintiff shall be entitled to claim the dependency exemption for Derek only. Defendant shall be entitled to claim the dependency exemptions for Connor and Ryan only. Defendant shall also be entitled to claim the deduction for all mortgage interest (including home equity line of credit) for 2012.
> 3. The issue of whether either Party shall be required to contribute to the other's tax liability is reserved."

This Order makes clear that the parties had the ability to calculate their potential tax liability, as the court had determined how the significant deductions would be allocated. The record reflects that neither party filed a separate income tax return for 2012, an extension for filing was requested, and almost three months later, on July 2, 2013, they agreed to file jointly for 2012, with plaintiff's liability capped at $5,000, and defendant's liability uncapped.[3] The Court concludes that plaintiff is not entitled to offset her 2012 withholdings against her liability to the defendant.

The parties agree that plaintiff is entitled to offset the following payments made by her:

Refund monies set off by the IRS from plaintiff's 2013 federal income tax refund ($6,490) and State of Michigan income tax refund ($607):	$7,097.00
Refund monies seized by the IRS for the 2014 federal income Tax refund:	$3,445.00
2015 IRS levy of Chase Bank account:	$64.27
June 13, 2015 IRS payment:	$2,044.81

The parties disagree as to whether plaintiff is entitled to offset penalties and interest paid by her on the remaining 2012 tax liability. Following the hearing held on July 20, 2015, the parties filed briefs with the Court explaining and supporting their respective positions. Plaintiff's

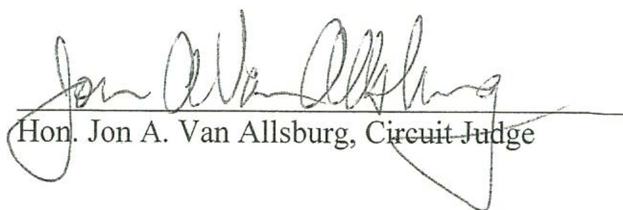
[3] Plaintiff's Exhibit D9 shows that the parties' 2012 joint federal income tax return was filed August 5, 2013.

brief notes that defendant made a final payment to the IRS, paying in full the remaining 2012 federal income tax liability, on August 13, 2015. She paid the remaining principal balance in the amount of $2,960, and penalties and interest in the amount of $1,878.32. The Court earlier noted that the parties' mediation agreement, incorporated in the Consent Judgment of Divorce, capped plaintiff's post-judgment contributions to 2012 income taxes at $5,000, while defendant's post-judgment contributions were left uncapped. It was known at the time of mediation that plaintiff would require time to pay her capped obligation, and the parties could have negotiated a further obligation to pay any resulting penalties and interest, but did not. Plaintiff's total payments, as noted above, total $17,489.40, and she is entitled to offset $12,489.40 against the balance of the judgment owed to the defendant.

The Court further approves the parties' stipulation that the plaintiff's remaining judgment obligation to the defendant may be paid at the rate of $100.00 bi-weekly, and that payment may be in the form of an installment judgment, precluding the use of garnishment while such payment obligation is in effect. The Court further approves Defendant's stipulation that he will forego a claim of lien against plaintiff's property to secure the balance of the Judgment due.

IT IS SO ORDERED.

Dated: September 10, 2015



Hon. Jon A. Van Allsburg, Circuit Judge