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 ROBERT SIMPSON
 BY _____
 DEPUTY

8 IN THE FAMILY DIVISION
 9 IN THE SECOND JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA
 IN AND FOR THE COUNTY OF WASHOE

10 ANDREW EARL FURER,
 11 Plaintiff,

CASE NO. DV04-01626
 DEPT. NO. 11

12 vs.

13 ELOISA BESADA FURER,
 14 Defendant.

15 MOTION TO AMEND OR ALTER THE FINDINGS OF FACT AND JUDGMENT
 16 PURSUANT TO NRCP 52(b) AND 59(e).

17 The defendant now comes before the court by and through her counsel, Robert
 18 W. Lueck, Esq. and Jarien Cho, Esq. and respectfully moves the court pursuant to
 19 NRCP 52(b) and 59(e) to alter or amend the findings of fact, conclusions of law and
 20 judgment heretofore filed with the court on February 22, 2008 and Notice of Entry
 21 thereof being filed on February 25, 2008.

22 DATED this 5th day of March, 2008.

23 Respectfully submitted,
 24 *Robert W. Lueck*
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1 Marital Settlement Agreement (hereafter "MSA"), that was later upheld by this court.
2 See Order After Trial filed November 14, 2005. The MSA was signed by Eloisa on July
3 2, 2004.

4 In the MSA, Eloisa was now to receive 570,000 shares of WaMu stock and
5 Andrew received the remainder, 579,000 shares. On a percentage basis, Eloisa
6 received 49.61% of the stock and Andrew received 50.39% of the stock.

7 For years, the WaMu stock was a sound investment that paid quarterly
8 dividends. The court noted in its findings of fact that the Furers received \$225,000.00
9 per month in passive income from their investments. Decree, finding 25, page 5. The
10 WaMu stock was the source of almost all, if not all of the passive income from
11 investments.

12 Since Andrew was essentially controlling almost all of the assets of the marriage,
13 (Decree, finding 25, page 5), the court entered two orders which purported to be a
14 support order. The first order, filed September 7, 2005, provided that Andrew was to
15 pay \$60,000.00 per month to Eloisa. The second order, filed April 14, 2006, provided
16 that she was to be paid \$112,500.00 per month, one half of the monthly passive income
17 of the parties. Whether these sums of money were to be characterized as attorneys
18 fees or spousal support was an issue reserved to the parties.

19 On that narrow point, everybody was wrong, the court and the lawyers, for the
20 reasons set forth herein. Those awards were neither spousal support nor attorney fees;
21 those funds were distributions of property that neither the court nor the lawyers for
22 either side were free to recharacterize or relabel.

23 Andrew had sought reimbursement for monies paid allegedly he claims for
24 spousal support during phase III of the trial. The court calculated how much money had
25 been paid to Eloisa at the \$60,000.00 per month amount and then how much was paid
26 at the \$112,500.00 rate for six months. The court determined that she had been paid a
27 total of \$1,255,000.00 which included a \$100,000.00 she had otherwise taken from
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1 Andrew's income. The court had calculated that Andrew had paid out a total of
2 \$2,830,000.00 in undifferentiated support and attorneys fees during the pendency of
3 the divorce. Decree, finding 23, page 5 and conclusion 15, page 14.

4 Conclusion 23 on page 15 provides that Eloisa is to repay Andrew for the
5 payments he made to her after November 14, 2006. Although the calculation is not
6 stated in the decree, it is simple to do from the decree's earlier figures and she would
7 thus have to reimburse \$1,575,000.00 to Andrew.

8 LEGAL ARGUMENT

9 N.R.C.P. 52(b) provides:

10 "Upon a party's motion filed not later than 10 days after service of written notice
11 of entry of judgment, the court may amend its findings or make additional findings and
12 may amend the judgment accordingly. When findings of fact are made in actions
13 tried without a jury, the sufficiency of the evidence supporting the findings may later be
questioned whether or not in the district court the party raising the question objected to
the findings, moved to amend them, or moved for partial findings."

14 N.R.C.P. 59(e) provides that "A motion to alter or amend the judgment shall be
15 filed no later than 10 days after service of written notice of entry of the judgment."

16 The Nevada Supreme Court has ruled that the trial court's findings must be
17 sufficient to indicate the factual basis for the court's ultimate conclusions. The supreme
18 court will not imply findings to support the judgment where the record is not clear and
19 would remand to the trial court for that purpose. See Commercial Cabinet Co. v.
20 Wallin, 103 Nev. 238, 240 (1987) and Bing Construction v. Vasey-Scott Engineering,
21 100 Nev. 72, 73 (1984).

22 It was a very fundamental error for this court to order Eloisa to repay Andrew
23 \$1,575,000.00 inasmuch as the court has upheld the MSA signed by the parties in July,
24 2004 by both parties. See Order After Trial finding 64, page 19. The MSA clearly
25 classifies her share of the WaMu stock as her separate property, page 2 of MSA,
26 Andrew's share of the WaMu stock was confirmed to him as his separate property. See
27 page 7 of the PNA as modified by the MSA at pages 2-3.

1 Thus, it is undisputed that the WaMu stock was property that was divided by the
2 parties and affirmed by the court as noted in its Nov. 14, 2006 Order After Trial.

3 The MSA is a contract and, as such, it is not within the province of the courts to
4 rewrite the contract of the parties. See Old Aztec Mine v. Brown, 97 Nev. 49, 52
5 (1981) ("Under well-settled rules of contract construction a court has no power to create
6 a new contract for the parties that they have not created or intended themselves.").

7 Yet, that is what the court has done. The court has upheld the MSA as a
8 contract and since it was signed in July, 2004, it generally is valid as of that time.

9 As long as it is separate property, Eloisa is entitled to the "rents, issues, and
10 profits thereof" i.e., she is entitled to the dividends from her 570,000 shares of WaMu
11 stock from July, 2004 forward. Likewise, so is Andrew for his 579,000 shares. See
12 NRS 123.130. Each party can control his or her own separate property. NRS 123.170.

13 However, the Decree provides only that she is entitled to her dividends paid after
14 November 14, 2006 and any interest thereon. If the MSA is valid, she is entitled to her
15 dividends and interest, if any, from July, 2004 forward, not some two plus years later.
16 Decree, finding 36, page 8.

17 While this divorce battle raged on, the dividends paid by WaMu went into an
18 account and were managed by Andrew. If her dividends were segregated in a separate
19 account as claimed in the decree, we are not sure of the proof of that account or how
20 much money, if any, is in that account.

21 It appears that the dividends from the WaMu stock were placed into a financial
22 account managed by Andrew. WaMu stock is publicly traded and information about the
23 dividend declarations are available in the public domain. The dividend price during the
24 time of the divorce ranges from 45 cents per share for the third quarter of 2004 (after
25 the MSA was signed) up to 56 cents per share in latter 2007.

26 This means that a considerable amount of the passive income of \$225,000.00
27 that the court referred to in the decree (finding 25) was derived from Eloisa's share of
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1 the WaMu stock. If that is the case, that means that much of her separate property
2 income, derived from those shares, was already paid out to her in the \$112,000.00
3 monthly allotment. Very little money would have come from Andrew's passive income
4 fund allocations.

5 In other words, most of that \$112,500.00 paid to her for 20 months was really her
6 own money to begin with and in reality she was simply receiving her own money. Little
7 money would have been coming from Andrew's passive income sources. It is error for
8 this court to repay Andrew for the receipt and use of her own money.

9 If there was any "separate account" as stated in the decree, the findings and
10 conclusions provide no information about that account and whether there is any money
11 in it. If the unknown "separate account" only holds her own 570,000 WaMu shares but
12 does not hold the dividend and/or interest income, then it is not relevant to the monthly
13 payment distribution.

14 There is nothing clear in the court's findings or conclusions describing the
15 \$112,500.00 as alimony or attorney fees. Apparently that was left to the parties to
16 decide. The fact is, this money was neither. It was passive income from property and
17 most of the money Eloisa received was her own money.

18 The court should reopen the divorce decree and alter or amend its findings to
19 correct the following errors and recalculate the division of property accordingly:

20 1. The court did not explain why Eloisa was not entitled to the passive earnings,
21 i.e. dividends, from her 570,000 shares of WaMu stock starting with the third quarter of
22 2004 and continuing calendar quarter thereafter until the final decree of divorce. She
23 has been deprived of large sums of money for the period of time from July, 2004
24 through November, 2006. That would be nine calendar quarters of dividend income for
25 which no accounting has been made in the findings of fact. Eloisa was "awarded"
26 \$60,000.00 per month from September, 2005 through April, 2006 which is far less than
27 what her dividend was from her shares alone. She received no dividend income from
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1 her shares from July, 2004 through the first three quarters of 2005. That also is a very
2 large sum of money and the court has not explained at all in its findings why she is not
3 entitled to her own money.

4 2. The current findings of fact by the court also fail to specify the sources of the
5 money in the passive income of the parties, \$225,000.00, as stated in finding of fact
6 #25. If her share of the WaMu dividends was included in that amount, that needs to be
7 clarified and so stated. Andrew is not lawfully entitled to be repaid for her share of the
8 passive income that was paid over to her in the form of unspecified spousal support or
9 attorney fees.

10 3. The court's conclusions of law fail to provide a legal basis for reimbursing
11 Andrew for support amounts paid from November, 2006 through December, 2007 when
12 most of the money she received may have come from the dividend income of her own
13 shares of WaMu stock.

14 COURT JURISDICTION TO CONSIDER THIS MOTION

15 Written Notice of the Entry of Decree was made on February 25, 2008. On
16 February 28, 2008, the plaintiff filed a Notice of Appeal to the Nevada Supreme Court.
17 This was done before the defendant could timely file this motion.

18 The legal question is whether this rapid filing of a notice of appeal precludes
19 defendant from timely filing a tolling motion under NRCP 52(b) and 59(e). In Nevada,
20 there is case law that a notice of appeal filed soon after a timely tolling motion is
21 deemed premature since the filing of such motions tolls the appeal filing time for all
22 parties. Such a notice of appeal is premature and the case can be remanded back to
23 the District Court for further proceedings. See Chapman Industries v. United Insurance
24 Company, 110 Nev. 454, 457 (1994) and NRAP 4(a)(2) ("A notice of appeal filed before
25 the formal disposition of any timely post-judgment motion enumerated in this
26 subdivision shall have no effect.").

27 This court has full jurisdiction to consider and dispose of this timely filed post-
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1 judgment motion regardless of the fact that the plaintiff has already filed his Notice of
2 Appeal several days before the deadline for such motions.

3 DATED this 6 day of March, 2008.

4 Respectfully submitted,

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**SECOND JUDICIAL DISTRICT COURT
COUNTY OF WASHOE, STATE OF NEVADA
AFFIRMATION
Pursuant to NRS 239B.030**

The undersigned does hereby affirm that the preceding:

Motion to Amend or Alter the Findings of Fact and Judgment Pursuant to NRCP 52(b) and 59(e)

filed in or submitted for District Court Case number: DV04-01626

Does not contain the social security number of any person.

-or-

Contains the social security number of a person as required by:

A specific state or federal law, to wit: _____

For the administration of a public program or for an application for a federal or state grant. _____

Confidential Family Court Information Sheet (NRS 125.130, NRS 125.230 and NRS 125B.055. _____

Robert W. Lueck
ROBERT W. LUECK, ESQ.
Attorney for Eloisa Furer

3/6/08
Date