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No. 70434-6-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SUSAN E. SHOLLY, LORNA L. STEWART,
and LINDA A. MULLINS
appellants

v.

CYNTHIA WORTH and JOHN WAY and WORTH LAW
GROUP, P.S., INC., a Washington Professional Services
Corporation, d/b/a WORTH LAW GROUP
Respondents.

APPELLANTS' REPLY BRIEF

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ATTORNEYS FOR APPELLANTS

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I. ARGUMENT IN REPLY TO RESPONDENTS' RESPONSE

Respondents make essentially two arguments in response to Appellant's appeal. First, they assert that Appellants offered no proof or damages. Secondly, they argue that Appellants failed to show collectability.

A. Contrary to Respondent's assertion that "Appellants have no proof that they suffered any damages by settling at mediation, Appellants have submitted sufficient evidence, which was considered by the trial court, to raise a question of fact that they suffered damage.

Respondent's assertion that it is "uncontroverted" that the value of Appellant's father's separate property and his share of the community property was approximately \$1,479,530 at the time of his death is incorrect. This fact was quite controverted.

What is undisputed is that the Trust at issue provided that James Stewart's second wife, Dorothy Dunson, would be allowed to utilize his "separate property" should he predecease her, as he did, but only to the extent that use of his separate property was required to provide for Dorothy Dunson, after she first utilized approximately \$606,000 of funds left to her, plus Mr. Stewart's army pension, for the remainder of her life. (CP 361).

Any portion of Mr. Stewart's "separate property" not utilized by Dorothy Dunson, and his share of community property, not consumed by Dorothy Dunson during her life, was to revert to the Appellants as their rightful inheritance. (CP 361-362).

Mr. Beaton's analysis showed that Mr. Stewart's separate property at the time of his death was valued at \$2.1 million. Mr. Beaton went on to analyze the terms of Mr. Stewart's estate plan (CP 361).

1. Neil Beaton's analysis.

The trial court considered Mr. Beaton's analysis and his opinions (CP 361-363). Mr. Beaton conducted a very thorough analysis of the valuation concerning Mr. Stewart's assets, both with regard to his separate estate and his interest in the community property to arrive at a very reasoned analysis of the sister's damages in this matter. To quote:

James W. Stewart passed away on March 9, 2009, leaving a separate estate with an approximate value of \$2.1 million, composed of 1.4 million in equity securities and \$645,000 in fixed income securities. In addition, Mr. Stewart's estate provided approximately \$606,000 of additional assets to his then current wife, Dorothy Dunson, at the time of his death. **Mr. Stewart's will provided that his then current wife, Ms. Dunson should first utilize the approximately \$606,000 of fund he left her, plus income from his army retirement, to cover her living expenses until she passed away, then she would be able to utilize a portion of the \$2.1 million in separate assets that were to be distributed to Mr. Stewart's daughters as needed.** (CP

361).

Mr. Beaton was aware that Ms. Dunson was receiving full time care and he researched the cost of that care over her remaining life expectancy following Mr. Stewart's death and concluded that Ms. Dunson would have had adequate funds to cover her living expenses from funds available to her without the "need to invade Mr. Stewart's separate assets, given her remaining life expectancy, which according to actuarial tables was 5.2 years from the date of Mr. Stewart's death – March 9, 2009. (CP 361). In fact, Ms. Dunson died on January 5, 2013, a year and a half prior to her estimated date of death based upon life expectancy tables. (CP 361-362). Mr. Beaton concluded as follows:

Based on the foregoing analyses and explanations, it is my preliminary opinion that Ms. Dunson would have had adequate separate funds from Mr. Stewart's estate to cover her living expenses during her life expectancy as of March 2009 [Date of Mr. Stewart's death] such that she would not have had to invade Mr. Stewart's separate estate assets that were to be distributed to Mr. Stewart's three daughters. (CP 363).

Since Dorothy Dunson didn't need to utilize Mr. Stewart's separate property, and never would have needed to utilize his separate property, the sisters suffered a significant loss. Contrary to Respondent's argument the loss at issue is not speculative. The loss consists of the difference between

what Respondent's apprised them as to the value of their expected inheritance benefit from their father, and the actual value of the benefit they would have inherited. Mr. Beaton provides a very detailed analysis of the foregoing.

Respondents raise a number of criticisms with regard to Mr. Beaton's analysis. They essentially argue that their experts are more informed than Appellants' experts, and that their experts are in possession of better information. That may well be the case, but that case is to be made at trial and not at summary judgment.

ER 703 provides that experts may base their opinion or inference on the facts or data in a particular case that are perceived by, or made known to an expert. Experts are entitled to rely upon, and in fact, most often must rely upon information and data provided by their clients. Experts are entitled to rely upon hearsay and otherwise independently inadmissible evidence. State v. Wineberg, 74 Wash.2d 372, 384, 444 P.2d 787 (1968); State v. Ecklund, 30 Wash. App. 313, 633 P.2d 933 (1981).

Mr. Beaton analyzed the information that the Appellants discovered after the mediation, applied that information to the terms of the Trust and concluded based upon his knowledge of life expectancy tables, and the cost of nursing home care, that Ms. Dunson would have no need to

“invade” Mr. Stewart’s separate property.

It is axiomatic that CR 56 only requires a party opposing such a motion to raise a question of material fact. Certainly damages are a question of material fact, but the fact that experts disagree on the damage analysis is not sufficient to allow the grant of a summary judgment motion.

B. Respondents’ assertion that Appellants submitted no evidence as to the collectability of their interests under the terms of the Trust fails to consider the fact that there were additional funds available at the time of mediation that would have been applied for the benefit of the sisters.

It is uncontested that James Stewart died on March 9, 2009 and that Respondents were retained very shortly thereafter on March 30, 2009, for the very reason that Appellants had a valid concern that Dorothy and Barbara Dunson were spending a portion of their father’s separate money in violation of the terms of the Trust.

Whether a judgment against Dorothy or Barbara would have been collectible is a question of fact. The case most on point on this issue is Lavigne v. Chase, Haskell, Hayes & Kalamon, 112 Wn. App. 677, 681, 50 P.3d 306 (2002).

In that case, the defendant attorney failed to perfect a judgment on

behalf of a client. The attorney asserted that the judgment was uncollectible and therefore the client had no sustained no damage.

The court found that genuine issues of material fact precluded summary judgment:

However, genuine issues of material fact remain as to collectibility even under the majority approach. The pleadings and evidence in the file indicate: (1) the judgment had a face value of slightly more than \$85,000; (2) Chase agreed to collect the judgment; (3) during its course of representation, Chase indicated the judgment would be very difficult to collect but stated also that settlement was a possibility; (4) the judgment creditors presently lack readily identifiable, attachable assets; (5) Mr. Bowen received considerable consulting fees from his brother, albeit irregularly; (6) the judgment creditors may have hid assets to prevent collection; (7) collection efforts in Arizona could have continued another five years had the judgment been renewed; and (8) Chase's failure to renew the judgment rendered it unenforceable in Arizona.

Viewing the evidence in a light most favorable to RCL, the nonmoving party, we cannot conclude the judgment was uncollectible as a matter of law. The judgment existed for a set amount and was enforceable in Washington and Arizona; those facts gave the judgment intrinsic settlement value. *Ridenour*, 854 P.2d at 1006. Chase never asserted during its representation that the judgment was entirely uncollectible; to the contrary, Chase indicated settlement was possible. While the settlement might be characterized as mere nuisance value, that characterization bears upon the amount of damages not damage or injury in the first place.

Clearly, but for Chase's failure to renew the judgment in Arizona, it would have remained enforceable for eventual collection or settlement. *Power Constructors*, 960 P.2d at

31-32; Kituskie, 714 A.2d at 1031-32. **The failure to renew the judgment likely rendered it worthless, as compared to one of arguable reduced value. In sum, what RCL would have ultimately collected from the judgment is a genuine issue of material fact to be resolved at trial.**

Here, the Respondent's settled at mediation, upon the advice of Respondents, at a discounted value, because they didn't know the full extent of their father's separate estate. By settling without full knowledge of their father's separate assets, their ability to collect any further damages against Dorothy and Barbara Dunson was extinguished thereby rendering their claims against Barbara and Dorothy uncollectible after that point.

As the Lavigne court held where the issue is not one of worthlessness in terms of collectability, but rather where the issue concerns the arguable reduced value of the claim, a genuine issue of material exists that precludes summary judgment. Those inferences and facts exist here. First, Respondent's expert witness, Mark Newton, valued Mr. Stewart's assets at \$1.48 million at the time of his death and opined that no assets had been concealed at the time of mediation. (CP 258-264). Appellants settled for less because they lacked sufficient information. Secondly, they settled for a discounted amount, which gives rise to an inference that there was money remaining that would have been collectible. Third, Sue

Sholly's preliminary calculations were in accord with Mr. Newton's. (CP-136, 420-422). The sisters settled for an approximate total of \$1.33 million.

On a summary judgment motion the non-moving client isn't required to prove the exact amount of collectability. That would essentially turn a summary judgment into a trial. Here, it is clear that there were funds remaining that Barbara and Dorothy hadn't then improperly spent that were for the benefit of the sisters, that would have been collectible, so this isn't a case of uncollectability. Rather, it is a question of the reduced value of what the sisters could have ultimately collected, but for the negligence that occurred at the mediation, and this is a question of fact and sufficient inferences and facts exist to show collectability.

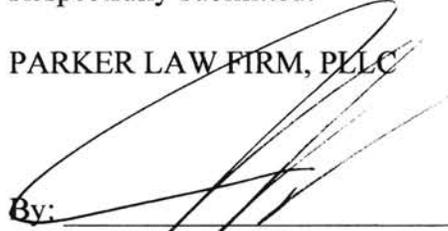
II. CONCLUSION

For the reasons above stated this court should reverse the trial court's grant of summary judgment

DATED this 6th day of March, 2014.

Respectfully submitted:

PARKER LAW FIRM, PLLC

By: 

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Attorney for Appellants

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DECLARATION OF SERVICE

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STATE OF WASHINGTON)
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COUNTY OF KING)

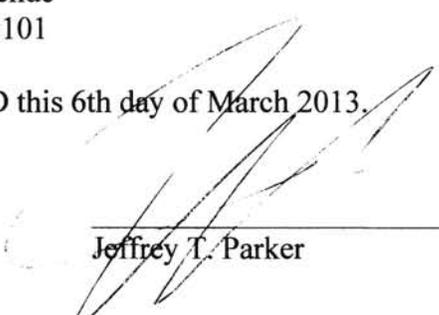
Jeffrey Parker, deposes and states as follows:

I am over the age of eighteen, competent to make the statements contained herein and I have personal knowledge of the same. My declaration is made under oath, pursuant to the penalty of perjury under the laws of the State of Washington.

1. I am the attorney for Appellants above named.
2. On March 6, 2014, I caused to be served upon Cozen & O’Conner, attorneys of record for defendants herein, one copy of the the Reply Brief of Appellants in this matter, by directing legal messengers to serve the same upon counsel for Respondent, Cozen & O’Conner at the address of

COZEN O’CONNER
1201 Third Avenue
Seattle, WA 98101

DATED this 6th day of March 2013.



Jeffrey T. Parker