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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOHN H. KIM, MIN H. KIM and EUGENE H. KIM,

Appellants,

v.

FRANK C. MOFFETT and "JANE DOE" MOFFETT, husband and
wife, and T.A.A., INCORPORATED,

Respondents.

BRIEF OF RESPONDENTS

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A. STATEMENT OF CASE

1. Parties.

Chul M. Kim (hereinafter "Kim") is an individual and the only plaintiff named in the original complaint. (CP 3 – 5)

JME Limited Partnership (hereinafter "JME") was added as a plaintiff in the amended complaint. (CP 8 – 10) JME Limited Partnership is a Washington Limited Partnership that was formed on January 7, 2003 (CP _____)¹

John H. Kim, Min H. Kim and Eugene H. Kim (hereinafter "Kim Children") are the adult children of Kim. They are the only plaintiffs named in the second amended complaint. (CP 168 – 174)

Frank C. Moffett and "Jane Doe" Moffett (hereinafter "Moffett") are husband and wife and defendants named the original, amended and second amended complaint.

T.A.A., Incorporated, (hereinafter any reference to "Moffett" includes T.A.A., Incorporated) is a corporation under which Moffett did business as an architect.² (CP 20, 258 – 260)

¹ Respondents filed their designation of clerk's papers at the same time they filed this brief. A page number, therefore, has not yet been assigned.

² Appellants assert that "Sogge" was a "principal" in T.A.A., Inc. Brief of Appellants at 4. He was a shareholder only. Sogge maintained an office and a practice separate and independent from Moffett. They did not share fees. (CP 33, 46 – 47, 252, 258 – 260)

2. Procedural Background.

On May 18, 2006, Kim filed a complaint alleging a breach of contract. (CP 3 – 5) An amended complaint that added JME as a plaintiff was filed on May 25, 2007. (CP 8 – 10)

The trial court granted Moffett's motion to dismiss the claim of Kim because he was not a real party in interest and granted Moffett's motion for an order on summary judgment dismissing the claim of JME. (CP 175 – 176)

Kim and JME filed a motion for reconsideration. The trial court denied the motion for reconsideration by a letter opinion filed on June 11, 2008 (CP _____)³ and by written order prepared and submitted by counsel on September 12, 2008. (CP 270)

The Kim Children filed a second amended complaint on February 12, 2008. (CP 168 – 174)

The trial court granted Moffett's motion for an order on summary judgment dismissing the claim of the Kim Children. The Kim Children were undisclosed principals on a personal services

³ See clerk's papers submitted in response to respondents' designation of clerk's papers.

contract between Moffett and Kim who was acting as an agent for the Kim Children.⁴ (CP 267 – 269)

This appeal followed.

3. Undisputed Facts

The following facts are the undisputed material facts.

- i. On October 19, 2001, Kim, as “owner” of two parcels of real property in Orinda, California, and Moffett, an architect, signed an agreement. The agreement provided that Moffett would provide a variety of architectural services related to the construction of two residences on the two parcels known as 2 Alice Court and 7 Alice Court in Orinda, California (hereinafter “the properties”). (CP 13 – 14, 17 – 20, 33 – 37)
- ii. On October 19, 2001, 2 Alice Court and 7 Alice Court in Orinda, California were, in fact, owned by the Kim Children. They had acquired title to the properties from

⁴ Moffett asserted an alternate basis for an order on summary judgment dismissing the claim of the Kim children. Moffett asserted that he had a right to resign under the terms of the written agreement and that he substantially complied with the agreement by giving actual, but not written, notice of his intent to resign. (CP 231 -233) The trial court did not rule on this portion of Moffett's motion. (CP _____). See clerk's papers submitted in response to respondents' designation of clerk's papers.)

the Strykowski Limited Partnership by virtue of a deed dated September 7, 2001. (CP 57 – 58, 70 – 71)

- iii. When Kim signed the October 19, 2001 agreement, he was acting as an agent for the Kim children. (CP 60 – 61)
- iv. JME did not exist on October 19, 2001 and did not come into existence until January 7, 2003. (CP _____)⁵
- v. When Kim signed the October 19, 2001 agreement, Moffett was unaware that he was acting as an agent for the Kim Children, or any other party. Moffett did not know that Kim had any children. Kim did not advise Moffett that he was acting on behalf of his children. Kim did not advise Moffett that he was acting on behalf of any other party other than himself. (CP 13 – 15, 36 – 37, 42 – 43, 61, 195 -197)
- vi. When this suit was commenced, the Kim Children no longer owned 2 Alice Court and 7 Alice Court in Orinda, California. The properties had been conveyed to JME by a deed dated December 30, 2002. (CP 58 – 59, 72)

⁵ See clerk's papers submitted in response to respondents' designation of clerk's papers.

- vii. After the agreement was signed on October 19, 2001, Moffett performed some architectural services related to the properties. In January or February of 2002, Moffett advised Kim that he could no longer perform any architectural services for him because he was taking a new position of employment with the United States Navy and moving to San Diego, California. (CP 14, 45, - 46, 223 – 224)
- viii. The October 19, 2001 agreement contains the following language: “This authorization may be withdrawn by me [Kim], or resigned by you [Moffett] for cause upon written notice.” (CP 36, 199 - 200)
- ix. After February of 2002, Moffett and Kim had no further communication with each other and Moffett performed no further services pursuant to the October 19, 2001 agreement. (CP 14, 52)
- x. From February of 2002, other professionals, including a Chan Sogge, an architect from Lacey, Washington, and an unnamed engineer in Portland, Oregon with whom Kim had signed a contract, performed work for Kim at his

request for the properties in Orinda, California. (CP 202 – 212)

- xi. Moffett moved from Olympia, Washington on or about February 15, 2002. They moved to 2380 Zion Street, Hanford, California 93230. Moffett began his employment with the United States Navy for the Department of Public Works at 750 Enterprise Avenue, Naval Air Station, Lemoore, California on February 25, 2008. (CP 223 – 224)
- xii. On or about October 11, 2002, Moffett purchased a residence at 2115 Knowlwood Drive, Hanford, California. Moffett lived at that address until approximately September of 2006. Moffett was served with the original summons and complaint in this action at that address on June 21, 2006. (CP 223 – 224, CP _____⁶)

B. ARGUMENT

1. Chul M. Kim is not a real party in interest.

The alleged damages identified and requested in this case relate and are incident to the ownership of the properties (the two lots in Orinda, California). (CP 144, 148 – 151, 193, 217 - 220) In

⁶ See clerk's papers submitted in response to respondents' designation of clerk's papers.

Kim's original complaint (CP 3 – 5), he alleges that he owned the properties. Kim and JME allege in the amended complaint (CP 8 - 10) that Kim was acting as an "agent" for JME which owned the properties. In the second amended complaint (CP 168 -174), the Kim Children allege that Kim was acting as their "agent" and that they owned the properties. In his deposition testimony, Kim was unequivocal that, at the time he signed the October 19, 2001 agreement, he was acting on behalf of the Kim Children. (CP 60 – 61)

CR 17(a) provides that "Every action shall be prosecuted in the name of the real party in interest." A "real party in interest" is defined as a person or entity who has a present and substantial interest in the matter and is able to show he, she or it will benefit by the relief granted. *State ex rel. Hays v. Wilson*, 17 Wn.2d 670, 672, 137 P.2d 105 (1943). An objection that a claim had not been brought in the name of the real party in interest may serve as a proper basis of a CR 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *Dennis v. Heggen*, 35 Wn. App. 432, 434, 667 P.2d 131 (1983).

The real party in interest in this case is the owner the properties in California. On October 19, 2001, the owners of the

properties were the Kim Children. By the time this lawsuit was commenced, the owner of the properties was JME. Kim was not an owner of the property and had not been an owner of the property since 1989 regarding 2 Alice Court (CP 64 – 65) and 1992 regarding 7 Alice Court (CP 66 – 67). An agent, not being the real party in interest, cannot maintain an action on behalf of his principal in his own name. See: *Denman et al. v. Richardson*, 284 F. 592 (1921).

Whatever claim, if any, asserted by Kim in the amended complaint was properly dismissed. He was not a real party in interest.

2. The October 19, 2001 agreement between Kim and Moffett is not a third-party beneficiary contract.

The law in the state of Washington regarding third-party beneficiary contracts is straightforward.

Washington law, following the categories recognized by the First Restatement of Contracts, classifies third-party beneficiaries into three categories.

The first is a creditor beneficiary, who is entitled to such status if “performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary...” One case provides an illustration of a creditor beneficiary: “A promises B that A will pay B’s debt to C.” The second type is a donee beneficiary, who is entitled to this status “if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make

a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary.” The third type is an incidental beneficiary. One Washington case relied upon the illustration provided in the Second Restatement: “A contracts to erect a building for C. B then contracts with A to supply lumber needed for the building. C is an incidental beneficiary of B’s promise, and B is an incidental beneficiary of C’s promise to pay A for the building.”

Both donee and creditor beneficiaries are entitled to sue to enforce the contractual obligations assumed by the actual parties to the contract. . . . On the other hand, incidental beneficiaries have no standing to enforce the contractual obligations assumed by the parties.

25 David K. DeWolf and Keller W. Allen, *Washington Practice Contract Law and Practice*, § 12.5, pp. 308 - 309 (2nd Ed. 2007)

(footnotes omitted).

A third-party beneficiary is one who, though not a party to the contract, will nevertheless receive direct benefits therefrom. In determining whether or not a third-party beneficiary status is created by a contract, the critical question is whether the benefits flow directly from the contract or whether they are merely incidental, indirect or consequential. 17 Am. Jur. 2d *Contracts* § 305 (1964). An incidental beneficiary acquires no right to recover damages for non-performance of the contract. Restatement on Contracts § 147 (1932). “[I]t is not sufficient that the performance of the promise may benefit a third person, but that it must have been entered into for his benefit, or at least such benefit must be the direct result of performance and so within the contemplation of the parties.” (Footnote omitted.) 17 Am. Jur. 2d *Contracts* § 304 (1964). “The question whether a contract is made for the benefit of a third person is one of construction. The intention of the parties in this respect is determined by the terms of the contract as a whole construed in the light of the circumstances under which it was made.” *Grand Lodge of Scandanavian Fraternity of America v. United State Fid. & Guar. Co.*, 2 Wn.2d 561, 569, 98 P.2d 971 (1940).

In regard to the requisite intent, in *Vikingstad v. Baggott*, 46 Wn. (2d) 494, 282 P. (2d) 824, we recognized the rule stated in 81 A. L. R. 1271, 1287, that such "intent" is not a desire or purpose to confer a benefit upon the third person, nor a desire to advance his interests, but an intent that the promisor shall assume a direct obligation to him.

American Pipe & Constr. Co. v. Harbor Constr. Co., 51 Wn2d 258, 266, 317 P.2d 521 (1957).

McDonald Construction Company v. Murray, 5 Wn. App. 68, 70 – 71, 485 P.2d 626 (1971).

Kim is not a third-party beneficiary. Neither JME nor the Kim Children are third-party beneficiaries.

When Kim signed the agreement, Moffett believed that he was dealing with Kim as owner of the properties. In fact and unknown to Moffett, Kim was acting as an agent for an undisclosed principal. The circumstances under which the agreement at issue in this case came into existence clearly show that there was no intent to benefit or assume a direct obligation to a third party, regardless whoever is alleged to be that third-party.

At his deposition, Kim testified as follows:

Q: And turning to your signature there, it's Chul Kim as owner on both Exhibits 2 and 3 [The October 19, 2001 agreements]. That wasn't any detail that was discussed?

A: No, it's not concern to me. I'm retaining his service.

Q: And if Mr. Moffett prepared both these documents, and he wrote in here "owner," I'm referring to Exhibits 2 and 3, that was his writing as you were saying?

A: Yes.

Q: And that was based on his understanding at the time?

A: I believe so.

Q: And you indicated nothing to him to correct him on that?

A: Well, it doesn't matter to him because all he care is that he wanted to get paid.

Q: Correct. But you didn't tell him anything to correct that?

A: No.

(CP 42 – 43)

Kim also testified as follows at his deposition:

Q: All right. On this document you signed it as Chul Kim as owner of these properties?

A: Yes.

Q: Is that accurate?

A: Not quite. No, it's not quite.

Q: Did you correct that?

A: No, I didn't correct it.

Q: Would Mr. Moffett at the time have had any reason to know that you listed as owner would be incorrect?

A: Well, see, I don't think I – I may not have told him all the details about ownership. All I did say that I need his service, so he must have thought I'm the owner.

Q: If Mr. Moffett prepared this document, Exhibit Number 1, and if he typed in the word "owner" there, that information must have come from you, would that be correct?

A: No, he just assumed that I'm the owner because I didn't tell him anything else, I didn't tell him that my sons owned or I owned, I didn't tell him anything. Just because I went to his house, asked for his service, he must have thought I'm the owner.

Q: And then you signed this without making that correction?

A: Yes, I felt that it's not important whether I show as owner.

(CP 195 – 197)

Moffett did not even know or hear of JME until the amended complaint was filed. JME did not even come into existence until January 7, 2003. Moffett did not even know that Kim had any children.⁷

As a matter of law, the owner of the properties in this case, whoever it might have been at whatever point in time, cannot qualify as a third-party beneficiary of the October 19, 2001

⁷ Appellants claim that, sometime before October 19, 2001, Kim provided to Moffett copies of minutes from the Orinda Planning Commission which he "had forgotten" to mention at his deposition. (CP 108) Although Moffett disputes that he was provided that information at that time, appellants will, for purposes of this appeal, be allowed the benefit of the doubt. Appellants, therefore, assert that Moffett "knew, or should have known" that Strykowski Limited Partnership owned the properties, at least at the time of the Orinda Planning Commission meetings. Brief of Appellants at 13. That assertion is not supported by the evidence. Moffett believed Kim to be the owner of the properties. (CP 13) Kim's deposition testimony quoted in the preceding paragraphs, which deposition testimony was not been changed, also supports the conclusion that Moffett believed Kim to be the owner of the properties. Furthermore, the documents themselves arguably identify Kim as the owner of the properties. (CP 123, 130 – 131) The fact that these documents may have been provided to Moffett does not create a genuine issue of fact. Ultimate facts, conclusions of fact or conclusory statements of fact are insufficient to show that there is a genuine issue for trial. See CR 56(e). *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 429-430, 38 P.3d 322 (2002).

agreement between Kim and Moffett. The October 19, 2001 agreement between Kim and Moffett is not a third-party beneficiary contract. See: *Warner v. Design & Build Homes, Inc.*, 128 Wn. App. 34, 43, 114 P.3d 664 (2005) (Holding that, in the construction context, the prevailing rule is that a property owner is generally not a third-party beneficiary of a contract between a general contractor and a subcontractor.)

At best, JME and the Kim Children, owners of the properties, are incidental beneficiaries. "An incidental beneficiary acquires no right to enforce the contract and cannot recover damages for non performance of a contract." 25 David K. DeWolf and Keller W. Allen, *Washington Practice Contract Law and Practice*, § 12.2, p. 306 (2nd Ed. 2007) (footnote omitted).

3. The Kim Children are undisclosed principals and, as such, may not enforce a personal services contract.

On October 19, 2001, the Kim children owned the properties at issue in this case. (CP 57 – 58, 70 – 71) Moffett knew nothing of the children.

Moffett knew nothing of the Strykowski Limited Partnership.⁸ Even if Moffett knew, or should have known, of the Strykowski

⁸ The Strykowski Limited Partnership has never been a party or ever sought to be a party to this case.

Limited Partnership on the basis of Kim's statement that, before October 19, 2001, he provided copies of the final minutes of the Orinda Planning Commission for their meetings on August 28, 2001 and October 9, 2001⁹, there is absolutely nothing in the record that would show that Moffett knew, or should have known, on October 19, 2001 when he signed his agreement with Kim, that the Kim Children were the successors to the Strykowski Limited Partnership and the then owners of the properties.

Kim, when he signed the October 19, 2001 agreement as "owner", was, in fact, acting as an agent. Kim's principals were the Kim children. The fact that Kim was acting as an agent, regardless who his principal or principals might have been, was unknown and undisclosed to Moffett when the October 19, 2001 agreement was signed. (CP 36 – 37, 42 – 43, 195 – 197)

The October 19, 2001 agreement called for Moffett to provide professional services as an architect for Kim. The agreement provided that such services would be subject to the approval and requirements of Kim. (CP 36, 39 – 40) An undisclosed principal may not enforce a contract negotiated by its agent to provide personal services.

⁹ See footnote 7 above.

Restatement (Third) Agency § 6.03, comment d (2006),
provides in part.

The nature of the performance that a contract requires from a third party determines whether an undisclosed principal is entitled to receive that performance. An undisclosed principal may not require that a third party render performance to the principal if rendering performance to the principal would materially change the nature of the third party's duty, materially increase the burden or risk imposed on the third party, or materially impair the third party's chance of receiving return performance. These limits correspond to the limits imposed on assignment of a contractual right. See Restatement Second, Contracts § 317(2).

Illustrations:

8. T agrees to work as a nanny for A. P, A's undisclosed principal, cannot require T to work as a nanny for P. The contract between T and A requires that T render personal services in an ongoing close association. Requiring T to render the services to P would materially change the nature of T's duties.

9. T agrees to sell Blackacre in exchange for cash to A, who acts on behalf of P, A's undisclosed principal. P may require performance from T. The contract made by A requires only the payment of money in exchange for Blackacre.

The Kim Children were undisclosed principals to the October 19, 2001 agreement for personal services. As such, they may not enforce the agreement.

[Text continues on next page.]

4. The October 19, 2001 agreement was not assigned and, because the agreement was for personal services, it is not assignable.

In this case, there is no evidence whatsoever of any assignment. There is no evidence of an assignment from Kim to the Strykowski Limited Partnership, the Kim Children or to JME. There is no evidence of an assignment from the Strykowski Limited Partnership to the Kim Children. There is no evidence of an assignment from any person or entity to any other person or entity.

An assignment may be defined as a manifestation of intent by the owner of a right to make a present transfer of the right to an assignee. 25 David K. DeWolf and Keller W. Allen, *Washington Practice Contract Law and Practice*, § 13.1, p. 313 (2nd Ed. 2007). In order for there to be a valid assignment, the assignment must describe the subject matter of the assignment with such particularity as to render it capable of identification. *Demopolis v. Galvin*, 57 Wn. App. 47, 53, 786 P.2d 804 (1990). Furthermore, an assignment is invalid where it does not comply with the general rule that, for an assignment to be valid, the assignor must relinquish all control and rights or power of revocation over the subject matter of the assignment. 25 David K. DeWolf and Keller W. Allen,

Washington Practice Contract Law and Practice, § 13.2, p. 315 (2nd Ed. 2007).

There is absolutely no evidence in this case that any assignment occurred. From the time the agreement was signed until this lawsuit was commenced in 2006, Kim exercised and asserted all rights under the agreement. (CP 49, 109) There is no evidence that anyone other than Kim asserted or even attempted to assert rights under the October 19, 2001 agreement. There was no assignment.

Furthermore, personal services contracts are not assignable. The limits on assignment of a contractual right are well established. If contractual rights involve a relation of personal confidence or personal service, they cannot be assigned. See: 25 David K. DeWolf and Keller W. Allen, *Washington Practice Contract Law and Practice*, § 13.4, p. 318 (2nd Ed. 2007). See also: *Robbins v. Hunts Food & Industries, Inc.*, 64 Wash.2d 289, 294, 391 P.2d 713 (1964) (citing *King v. West Coast Grocery Co.*, 72 Wash. 132, 136, 129 P. 1081 (1913)).

Appellants, the Kim Children, rely on *Berschauer/Phillips Construction Co. v. Seattle School District No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1994) in support of their argument that they, as

assignees, have a right to bring an action for damages. Their reliance is misplaced for two reasons.

First, there was an assignment in *Berschauer/Phillips*. The Seattle School District assigned its claim against the architect to Berschauer/Phillips Construction Co. In this case, the Kim Children have presented no evidence of an assignment.

If the Kim Children are asserting a claim as assignees, then who was the assignor? It appears that the Kim Children are asserting that the Strykowski Limited Partnership was the assignor. (Brief of Appellants at 14 - 15.) The Strykowski Limited Partnership was not a disclosed principal. The Strykowski Limited Partnership owned no interest in the properties when the agreement was signed on October 19, 2001. There is no evidence of any assignment from the Strykowski Limited Partnership to the Kim Children.

There is no evidence and not even an assertion that Kim is an assignor. The allegation is and the undisputed evidence shows that Kim was the agent of the Kim children. The Kim Children are the undisclosed principals.

Second, *Berschauer/Phillips* was not a case regarding an undisclosed principal. The Seattle School District was a party to a

contract with the defendant architect and not an undisclosed principal. The Seattle School District assigned its claim for breach of contract to Berschauer/Phillips Construction Co.

In this case, the Kim Children are asserting their claim against Moffett as undisclosed principals on a contract executed by Kim, their agent. As such, the Kim Children do not gain the same status held by Berschauer/Phillips Construction Co., as an assignee, in *Berschauer/Phillips* merely by claiming that they are assignees of the Strykowski Limited Partnership or whomever.

Berschauer/Phillips concerned the construction and interpretation of an anti-assignment clause. The Supreme Court held that the anti-assignment clause in the contract between the Seattle School District and the architect prohibited the Seattle School District from assigning the contract for performance but that it did not prohibit the School District from assigning its cause of action for breach of the contract.

In *Berschauer/Phillips*, the Seattle School District was a party to the personal services contract. If, in *Berschauer/Phillips*, the Seattle School District had been an undisclosed principal on its contract with the architect, then the Seattle School District, as an undisclosed principal, could not have even enforced a claim for

performance. If, in that scenario, the Seattle School District, as an undisclosed principal, could not enforce a claim for performance, then it is only logical that it would have no claim to assign including a claim for damages for failure to perform.

In any event, the Kim Children are not assignees in this case. The Kim Children are undisclosed principals. Undisclosed principals may not seek enforcement of a personal services contract. If an undisclosed principal cannot enforce performance of a personal services contract, then it only stands to reason that an undisclosed principal may not pursue a claim for damages as a result of a lack of such performance. Further, if an undisclosed principal assigns a claim for damages on a contract that it cannot enforce, it makes no sense that the assignee, somehow by virtue of being an assignee, then acquires a claim that can be pursued. *Berschauer/Phillips* does not support such a rule.

5. Dismissal of the claim of the Kim Children may be sustained on alternate grounds.

The trial court dismissed the claim of the Kim Children because they were undisclosed principals on a personal services contract. (CP 267 – 269) Moffett's motion for an order of summary judgment dismissing the claim of the Kim Children also requested

an order of dismissal on the basis that Moffett had substantially complied with the term of the October 19, 2001 agreement that allowed him to resign at any time upon written notice to Kim. (CP 231 – 233)

The October 19, 2001 agreement specifically allowed Moffett to resign upon written notice to Kim. (CP 18) In late January or early February of 2002, Moffett did give and Kim did receive specific notice, albeit unwritten, from Moffett of his intent to resign.¹⁰ (CP 14, 45, - 46, 223 – 224) The fact that Moffett's notice to Kim of his resignation was not provided in written form should not defeat the effectiveness of his resignation. Moffett substantially complied with that term of the October 19, 2001 agreement that allowed for his resignation. His resignation should be deemed effective.

The trial court expressly did not rule on this issue. See letter opinion dated August 11, 2008. (CP _____)¹¹ If necessary, the appellate court may uphold the ruling of the trial court that is on appeal on any basis that is supported by the record. An appellate court can sustain the trial court's judgment upon any theory

¹⁰ In their brief, appellants assert that Kim had "one year" to obtain building permits for the construction of the two residences on the properties in Orinda, California. In fact, Kim had two years (one year plus a one-year extension) until October of 2003 to obtain the permits. (CP 49 & 151)

¹¹ See clerk's papers submitted in response to respondents' designation of clerk's papers.

established by the pleadings and supported by proof, even if the trial court did not consider it. *Stieneke v. Russi*, 145 Wn. App. 544, 559 - 560, 190 P.3d 60 (2008) This grounds for dismissal is offered to the appellate court as alternate basis, if needed, on which the dismissal of all the claims asserted by Kim, JME and the Kim Children in this case may be sustained.

6. Appellants are not entitled to attorney fees on appeal.

Appellants have requested an award of "attorney's fees and cost pursuant to statute." (Brief of Appellants at 16.) RAP 18.1 requires that attorney fee requests be supported by argument and citation to authority. *State v. Jordan*, 146 Wn. App. 395, 404, 190 P.3d 516 (2008) Appellants present no argument. Appellants cite no authority. Their request for attorney fees should fail.

7. Respondents should be awarded attorney fees and costs on appeal.

Moffett requests that he awarded attorney fees and costs on appeal. His request is made pursuant to RAP 18.1(a) and RAP 18.9(a). RAP 18.9(a) allows this court to require a party to "pay terms or compensatory damages" caused by a "frivolous appeal."

It is argued by Moffett that this appeal is a frivolous. There are no seriously debatable issues presented upon which

reasonable minds might differ. This appeal is devoid of merit. Moffett should, therefore, be awarded his attorney fees and costs that were incurred as a result of this appeal. *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 535, 79 P.3d 1154 (2003)

C. CONCLUSION

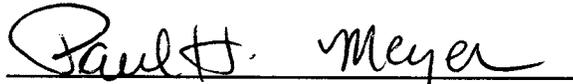
The decision of the trial court dismissing the claim of Kim because he was not a real party in interest ought to be affirmed. The decision of the trial court dismissing the claim of JME because of a lack of a contractual relationship between JME and Moffett ought to be affirmed. The decision of the trial court dismissing the claim of the Kim Children because they were undisclosed principals on a personal services contract ought to be affirmed.

The decisions of the trial court can, if necessary, be affirmed on the alternate grounds that Moffett's notice to Kim of his intent to resign, although not written, was effective notice and was in substantial compliance with the terms of the October 19, 2001 agreement between Kim and Moffett.

[Text continues on next page.]

Finally, Moffett should be awarded his costs and reasonable attorneys incurred by him as a result of this appeal because this appeal presents no debatable issues upon which reasonable minds might differ.

Respectfully submitted this 30th day of January, 2009

A handwritten signature in cursive script that reads "Paul H. Meyer". The signature is written in black ink and is positioned above a horizontal line.

Paul H. Meyer WSB #12157
Attorney for Respondent

Paul H. Meyer, WSB #12157
Attorney at Law
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the state of Washington, that, on January 30, 2009, I caused the foregoing Brief of Respondents to be served on the following counsel of record by hand delivering a copy of the same to the office of the following counsel at the below listed address:

Douglas D. Sulkosky
Attorney at Law
535 Dock Street, Suite 100
Tacoma, WA 98402

Signed at Olympia, Washington on January 30, 2009.



Paul H. Meyer WSB #12157
Attorney for Respondent

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