

FILED  
COURT OF APPEALS  
DIVISION II  
2015 DEC 21 PM 4:03  
STATE OF WASHINGTON  
BY U  
DEPUTY

47657-6-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

---

SARAH JOHNSON, as Personal Representative of the  
ESTATE OF PHILLIP CUNNINGHAM,

Appellant,

v.

CITY OF TACOMA, a municipality,

Respondent.

---

CORRECTED APPELLANT'S REPLY BRIEF

---

1501 Dock Street  
Tacoma, Washington 98402  
Tacoma: (253) 627-1091

SMITH ALLING, P.S.

C. Tyler Shillito, WSBA #36774  
Morgan K. Edrington, WSBA  
#46388

Attorneys for Appellant

**ORIGINAL**

**TABLE OF CONTENTS**

I. ARGUMENT IN REPLY ..... 1

    A. The City’s Cross-Appeal Regarding the  
    Order Striking Testimony of Marni  
    Moore Should be Stricken as Untimely.....1

    B. Portions of the City’s Brief Relying  
    on the Stricken Declaration should  
    be Disregarded.....2

    C. In the Alternative, if this Court considers  
    the City’s Appeal as Timely, the Trial  
    Court Properly Struck the Affidavit of  
    Marni Moore .....2-5

    D. Genuine Issues of Material Fact Exist  
    that Precluded Summary Judgment .....5-10

    E. Pleading for Unjust Enrichment was  
    Properly in the Alternative.....10-12

II. CONCLUSION ..... 12

## TABLE OF AUTHORITIES

### STATE CASES

<i>Austin v. Ettl</i> , 171 Wn. App. 82, 286 P.3d 85 (2012).....	7
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990) .....	8
<i>Compare May v. Triple C. Convalescent Centers</i> , 19 Wn. App. 794, 578 P.2d 541 (1978).....	4
<i>Ebel v. Fairwood Park II Homeowners' Ass'n.</i> 136 Wn. App. 797, 150 P.3d 1163 (2007).....	2
<i>Guy Stickney, Inc. v. Underwood</i> , 67 Wn.2d 824, 410 P.2 7 (1966).....	8
<i>Holmes v. Radford</i> , 143 Wash. 644, 255 P. 1039 (1927) .....	10
<i>In re Cunningham's Estate</i> , 94 Wash. 191, 161 P. 1193 (1917).....	2
<i>In re Estate of Coredo</i> , 127 Wn. App. 783, 113 P.3d 16 (2005).....	2
<i>Jones v. State, Dept. of Health</i> , 170 Wn.2d 338, 242 P.3d 825 (2010).....	7
<i>Ross v. Kirner</i> , 162 Wn.2d 493, 499, 172 P.3d 701 (2007).....	7
<i>St Yves v. Mid State Bank</i> , 111 Wn.2d 374, 757 P.2d 1384 (1988) .....	8
<i>Wildman v. Taylor</i> , 46 Wn. App. 546, 731 P.2d 541 (1987).....	3

*Young v. Young*, 164 Wn. 2d 477, 484,  
191 P.3d 1258, 1262 (2008) ..... 11

**STATUTES**

RCW 5.60.030 ..... 3

**RULES**

CR 56(c)..... 7

RAP 5.2(a) ..... 1

RAP 5.2(f)..... 1

## I. ARGUMENT IN REPLY

### A. **The City's Cross-Appeal Regarding the Order Striking Testimony of Marni Moore Should be Stricken as Untimely.**

In its Response brief, the City of Tacoma (the "City") assigns error to the trial court's Order Striking the Testimony of Marni Moore entered on May 1, 2015. CP 131-32. The City did not file its "Notice of Cross-Review" until June 29, 2015, more than 30 days after the date the Order was entered, and more than 14 days after the notice of appeal was filed by Ms. Johnson. Any party must file a notice of appeal within "30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed. RAP 5.2(a). When a party files the notice of appeal on the 30th day from the date of entry of the order, any subsequent notice by another party may be filed within fourteen days after service of the notice. RAP 5.2(f).

The notice of appeal was filed by Ms. Johnson on May 29, 2015. Accordingly, the City should have filed its notice of cross-appeal within fourteen days. Filing the cross-notice for review on June 29, 2015 was deficient. The cross-appeal should be stricken and the assignments of error on cross-appeal (namely the issues relating to the Order Striking the Testimony of Marni Moore) should not be considered.

**B. Portions of the City's Brief Relying on the Stricken Declaration should be Disregarded.**

Numerous times through the City's brief it relies on citations to the Affidavit of Marni Moore (CP 87-89). This Affidavit was stricken by the trial court. The City's notice of appeal with regard to that order was not timely. As such, this Court should disregard the references to testimony offered by Ms. Moore (any citation to CP 87-89). It is not properly before the Court and the trial court Properly struck that declaration.

**C. In the Alternative, if this Court considers the City's Appeal as Timely, the Trial Court Properly Struck the Affidavit of Marni Moore.**

Under principles of the deadman's statute, the City employees should not be permitted to testify as to comments made by or to Mr. Cunningham. The purpose of the deadman's statute is to prevent interested parties from giving self-serving testimony regarding conversations and transactions with the deceased because the dead cannot respond to unfavorable testimony. *In re Estate of Coredo*, 127 Wn. App. 783, 113 P.3d 16 (2005), *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 797, 150 P.3d 1163 (2007). This doctrine applies where "[d]eath having closed the lips of one party, the law closes the lips of the other." *In re Cunningham's Estate*, 94 Wash. 191, 161 P. 1193 (1917).

The rule comes from statute:

No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility: PROVIDED, HOWEVER, That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or as the guardian or limited guardian of the estate or person of any incompetent or disabled person, or of any minor under the age of fourteen years, then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent or disabled person, or by any such minor under the age of fourteen years: PROVIDED FURTHER, That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and have no other or further interest in the action.

RCW 5.60.030.

Testimony about a transaction with a deceased turns on whether the testimony is about the management of any affair, where the testimony could be contradicted by the deceased if he or she were still alive. *See Wildman v Taylor*, 46 Wn. App. 546, 731 P.2d 541 (1987). Whether the testimony of the deceased would actually contradict the testimony offered is immaterial. *Id.* The emphasis is on whether the deceased could have offered contradictory testimony.

The City's position is that its employees are not parties in interest. The facts of this case, however, make the City's employees uniquely in interest because they will also benefit from the health of the TERS system as a whole. *Compare May v Triple C. Convalescent Centers*, 19 Wn. App. 794, 578 P.2d 541 (1978) (an employee of an interested party, solely because of role as employee, is not a party in interest for purposes of the deadman's statute). While employment alone is insufficient to constitute a party in interest, the issue in this case involves a planned benefit for all City employees. All employees who contribute to the TERS plan have an interest in preservation of plan assets—albeit at times minimal interest, the interest is there all the same. The City can *only* testify through its employees. Because the funds at issue are retirement funds within an employee plan, all City employees are parties in interest through their contributions to that plan. The “party in interest” status arises in this case from the relationship as contributors to the plan *and* City employees—not the employment status alone.

The purpose of the deadman's statute is to protect against this exact type of circumstance: where a testifying party with an interest in the proceedings testifies as to the transaction with the decedent. Here, however, the inability of the decedent to testify is of paramount concern because the issue in this case is the representations by the City to Mr.

Cunningham and Mr. Cunningham's alleged understanding in light of the ambiguity created by the City's forms. To accept the testimony of the City employees that Mr. Cunningham understood his beneficiary designation and understood the ambiguity between the forms is in direct conflict with the purpose of the deadman's statute. As such, the testimony of these employees should be rejected.

**D. Genuine Issues of Material Fact Exist that Precluded Summary Judgment.**

The only evidence the City relies upon to dispute any issue of material fact is evidence offered in the self-serving affidavit of Marni Moore that was stricken by the trial court. Even still, the evidence offered by the City to dispute that Mr. Cunningham intended to leave his retirement account to his Estate creates a question of fact. The crux of this case turns on what was meant by the writing of "Estate" on the retirement document. The only explanation the City can offer is the testimony of Marni Moore as to what was communicated to Mr. Cunningham when "Estate" was written on the document, and that affidavit was properly stricken and not timely appealed.

Nothing on the document tells a retiree where the remainder of their retirement benefits would pass upon the retiree's death. There is no information explaining explicitly the effect of the designation. The only

information on the face of the document is a handwritten notation that the remainder of Mr. Cunningham's retirement benefits is transferred to his "Estate" upon death.

The City's response is that numerous other documents and online resources may have explained to Mr. Cunningham what his selection meant, despite the words "Estate" appearing on his retirement forms. The City would have the Court believe that Mr. Cunningham's retirement selection was not misrepresented to him, or that there was no breach of contract claim because he could have compared numerous resources, none of which were affixed to the form at issue, to understand what his selection meant.

The City cannot reconcile that Mr. Cunningham was told for years "If you do not specifically designate a beneficiary, the default beneficiary will be your estate" with its current position. These inconsistencies on the face of the City's documents it provided to Mr. Cunningham create genuine issues of material fact.

On the face of the documents, Mr. Cunningham was led to believe that his Estate was the beneficiary of his retirement benefits. This alone raises a genuine question of material fact as to the representations made to Mr. Cunningham. The only way to resolve this question of fact is to rely on the self-serving statements of City's employee (which were stricken) as

to what the documents meant. This is a credibility determination that cannot be resolved on summary judgment. *See Jones v. State, Dept. of Health*, 170 Wn.2d 338, 242 P.3d 825 (2010) (citing CR 56(c)).

In light of the genuine issues of fact as to what Mr. Cunningham was told, and what he understood the terms of his selection to mean, the court should not have dismissed this action. To prove negligent misrepresentation, the Estate would have to show: (1) the defendant supplied information for the guidance of others in their business transactions that was false; (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions; (3) the defendant was negligent in obtaining or communicating the false information; (4) the plaintiff relied upon the false information; (5) the plaintiff's reliance was reasonable; and (6) the false information proximately caused the plaintiff's damages. *Austin v. Ettl*, 171 Wn. App. 82, 286 P.3d 85 (2012) (citing *Ross v. Kirner*, 162 Wn.2d 493, 499, 172 P.3d 701 (2007))

By writing "Estate" on the document and sending other documents informing Mr. Cunningham that no beneficiary designation would result as the default beneficiary being his Estate, the City conveyed false information. As the administrator of TERS and the sole provider as to the meaning of the City-drafted documents, the City knew or should have

known that the information it supplied to Mr. Cunningham was false. At a minimum, by failing to provide documents that were not conflicting or misleading, the City was negligent in communicating to Mr. Cunningham the true beneficiary of his residual retirement benefits, and Mr. Cunningham reasonably relied on this information when he received numerous documents stating that the Estate would be the beneficiary of his residual retirement benefits. To Mr. Cunningham, it would have been reasonable to make no specific designation of a beneficiary because his daughter Sarah was receiving the entirety of his Estate as he wanted.

Similarly, the ambiguities of the documents created a genuine issue of material fact that precluded summary judgment on the claims for breach of contract. The purpose of a court in interpreting a contract is to ascertain the intent of the parties. *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990). If a court is ambiguous on its face, the court will look to other evidence of the parties' intent, and the objective of the contract, the circumstances of its making, the subsequent conduct of the parties and the reasonableness of each parties' interpretation. *Id.* See *St. Yves v. Mid State Bank*, 111 Wn.2d 374, 757 P.2d 1384 (1988). A court construes ambiguous language of a contract against the drafter. *Id.* (citing *Guy Stickney, Inc. v. Underwood*, 67 Wn.2d 824, 410 P.2 7 (1966)).

Mr. Cunningham's retirement documents informed him that his designation was "unmodified." After receiving documents for years that told him he had no beneficiary designated, and therefore his Estate would be the default beneficiary, Mr. Cunningham had no apparent reason to believe that unmodified would take the residue away from his Estate. Again, the only evidence the City can point to are documents that were not affixed to the Application for Retirement, online pages that there is no evidence Mr. Cunningham saw, and the self-serving testimony of its employee. All of this further compounds the ambiguities and creates a question of fact that the trial court must resolve, and not at summary judgment.

**E. Pleading for Unjust Enrichment was Properly in the Alternative.**

The City's references to the general pool of assets and explanation of a defined benefit plan underscores the unjust nature of the City's position. *See Resp. Brief at 27-28.* It is undisputed that Mr. Cunningham made contributions to his retirement plan in the amount of \$170,504.89, and that he was entitled to defined benefits. Because Mr. Cunningham died within weeks of his retirement, and the City has made ambiguous determinations to the beneficiary designation of his benefits, the City has

been unjustly enriched by Mr. Cunningham's contributions and that the City has escaped paying any of the benefits under the plan.

The fact that there is no individual retirement account after the time of retirement does not change that Mr. Cunningham contributed to the plan and now is deprived of the benefits. The City, accordingly, has been unjustly enriched. Mr. Cunningham did not receive the predetermined benefits he was entitled to because his Estate did not receive the predetermined residual benefit. The City acknowledges that residual benefits *can* be paid to a retiree's Estate, but contends that Mr. Cunningham did not make the proper election. The fact that this was a defined benefit plan does not change that the City was unjustly enriched by avoiding paying the residual benefits to the Estate.

The unjust enrichment claim is in the alternative, in the event the Court were to find that the ambiguities in the contractual documents prevented a meeting of the minds, or a final agreement. *See e.g. Holmes v. Radford*, 143 Wash. 644, 255 P. 1039 (1927) (a party may recover on equitable grounds such as quantum meruit when the contract claim plead is not supported because the evidence does not establish a contractual relationship actually existed). In this situation, it was proper to preserve the alternate relief when the contract contained such ambiguities.

Proving unjust enrichment requires the establishment of three elements: (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; (3) and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value. *Young v. Young*, 164 Wn. 2d 477, 484, 191 P.3d 1258, 1262 (2008).

Here, Mr. Cunningham conferred a benefit by contributing to the plan for years with the explanation that his absence of a beneficiary designation would leave the residual value of his retirement benefits to his Estate. The knowledge and acceptance of this by the City is established by the numerous documents the City created that show the Estate as the beneficiary. To allow the City to now explain away that “Estate” written on the Application for Retirement means something *other* than to Mr. Cunningham’s Estate is unjust and inequitable. The City should not be permitted to benefit from its own inconsistent statements and documents.

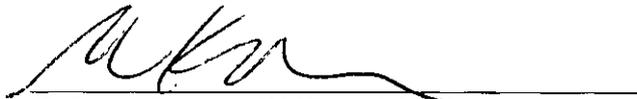
## **II. CONCLUSION**

Based on the genuine issues of material fact, the court should not have dismissed the Complaint on summary judgment. Mr. Cunningham died within weeks of his retirement. The City should not receive a windfall from his untimely death and his resulting inability to testify as to

his own understanding when the City's documents are ambiguous and conflicting on their face. The City employee designated his "Estate" as the beneficiary of his retirement benefits without any other explanation. The City should not be permitted to backfill an alternate meaning as to what "Estate" means now that Mr. Cunningham is no longer here to tell his story.

RESPECTFULLY SUBMITTED this 21st day of December, 2015.

SMITH ALLING P.S.

A handwritten signature in black ink, appearing to read 'MKE', is written over a horizontal line.

C. Tyler Shillito, WSBA #36774  
Morgan K. Edrington, WSBA #46388  
Attorneys for Appellant

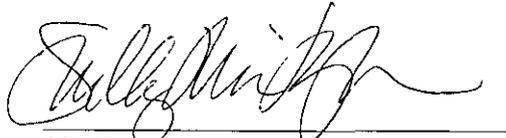
FILED  
COURT OF APPEALS  
DIVISION II  
2015 DEC 21 PM 4:03  
STATE OF WASHINGTON

**CERTIFICATE OF SERVICE BY**

I hereby certify that on the 21st day of December, 2015, I caused to be served a true and correct copy of [this] Brief of Appellant upon counsel of record, via the methods noted below, properly addressed as follows:

Ms. Margaret Elofson	<input checked="" type="checkbox"/>	Hand Delivery
Tacoma City Attorney	<input type="checkbox"/>	U.S. Mail
Civil Division	<input type="checkbox"/>	Overnight Mail
747 Market Street, Room 1120	<input type="checkbox"/>	Facsimile
Tacoma, WA 98402	<input checked="" type="checkbox"/>	Email
Phone: 253-591-5885		
Fax: 253-591-5775		
Email: margaret.elfson@ci.tacoma.wa.us		

DATED this 21<sup>st</sup> day of December, 2015.

  
\_\_\_\_\_  
Shelly-Marie Magdalaro,  
Legal Assistant