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

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JAGJIT PREHAR, et al.,

Appellants,

V.

BALWINDER DEOL, et al.,

Respondents.

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**APPELLANTS' REPLY BRIEF**

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## **I. Introduction**

Respondent's Brief fails to demonstrate why the Court should affirm the judgment below. Respondent's position relies heavily on the alleged knowledge of, conduct of, and duties owed to the non-existent "members" of VSS. Respondent fails to show any lack of substantial evidence supporting the trial court's finding that VSS consented to the use of its funds to purchase the property in Prehar's name. Moreover, none of Respondent's alternative bases for affirmance fit the facts of this case: "restitution based on unjust enrichment" is not warranted, because Prehar was not unjustly enriched; the theory of "money had and received" does not fit the facts of this case; and the trial court did not err in finding that Prehar did not breach his fiduciary duty to VSS. In addition, the record contains clear, cogent, and convincing evidence sufficient to prove Prehar's defense of equitable estoppel. Respondent's arguments regarding prejudgment interest lack merit. Finally, Respondent's cross-appeal should be denied for the same

reasons the judgment should be reversed—VSS consented to its funds being used to purchase the property, VSS never demanded the return of these funds, and Prehar would be unjustly harmed if he is ordered to reimburse VSS for those funds.

## **II. Rebuttal of Respondent’s Arguments re Appellants’ Appeal**

### **A. There are no “Members” of VSS.**

Respondent premises many of its arguments on a fundamental misconception that Respondent has sought to perpetuate throughout this litigation—that there are “members” of VSS. Contrary to Respondent’s numerous references, however, to these undefined and unspecified “members,” the record is abundantly clear—VSS never had any “members.” VSS was a nonprofit charitable corporation established under RCW Chapter 24.03, which governs such corporations in Washington. Under RCW 24.03.065(1), there are two types of nonprofit charitable corporations—those that have members,

and those that do not: “A corporation may have one or more classes of members or may have no members.” RCW 24.03.005(15) defines a “Member” of a such a corporation as “an individual or entity having membership rights in a corporation *in accordance with the provisions of its articles of incorporation or bylaws.*” But VSS’s articles of incorporation do not confer membership rights on anyone,<sup>1</sup> and it had no bylaws. As a result, VSS does not have any members.

Because VSS does not have any members, it is inherently misleading for Respondent to repeatedly refer to the “members” of VSS in its brief. For example, the very first sentence of Respondent’s Brief Statement of the Case asserts that VSS received “donations from its *members* for the purchase of a building to conduct religious activities;”<sup>2</sup> the correct statement would be that VSS received donations from its *donors*. In the very next sentence, Respondent claims: “The corporation has had many *members* including those who contributed money to

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<sup>1</sup> Exh. 51

<sup>2</sup> Respondent’s Brief (“RB”), p. 3.

help fund the purchase. *Sixteen of them* executed a corporate resolution in January of 2016 when this litigation began.”<sup>3</sup>

Again, VSS never conferred membership rights on anyone, so VSS never had “many members,” and these sixteen people had no authority to execute any “corporate resolutions.”<sup>4</sup>

Thereafter, Respondent relates that an “amended complaint was filed on behalf of *members* of VSS;” but this cannot be true, as there were no members.

Once Respondent has created these fictitious members, it uses them to advance certain spurious arguments. For instance, Respondent argues that the “Prehars would have to prove that *all the members* of VSS...gave consent to VSS funds being used to allow the Prehars to obtain title to the property in their own name.”<sup>5</sup> To further this argument, Respondent argues that Prehar “would also have to show that *the members* gave this consent after being apprised of all material facts, including their

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<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Id.* at 19

legal effect.”<sup>6</sup> Respondent argues extensively about all the disclosures that would have to be made to prove that all the “members” of VSS gave their consent. Because VSS never had any “members,” however, Prehar would have to prove the impossible. In sum, any argument Respondent bases on the alleged knowledge of, conduct by, or duty owed to VSS “members” should be disregarded by the Court.

By the same token, so should any argument Respondent bases on the alleged knowledge of, conduct by, or duties owed to what Respondent refers to, variously, as the “community members,” or the “Sikh community,” “members of the community,” or simply, the “community.” For example, Respondent argues, repeatedly and in various ways, that “[o]ther *members of the Sikh community* had the...understanding” title to the building would be transferred to VSS, and that “[*m]embers of the community* pressed

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<sup>6</sup> *Ibid.*

Mr. Prehar to title the property in the name of VSS.”<sup>7</sup> But this case is not a class action brought on behalf of the “members of the Sikh community;” instead, the case was brought on behalf of VSS and certain other individuals, and only VSS obtained any judgment in its favor. VSS is a separate legal entity, and VSS’s funds were allegedly converted. Accordingly, the only thing that matters is the knowledge of, conduct by, or duty owed to VSS; whatever the “community members” may have understood, or thought, or heard, or believed, or requested, or desired is simply irrelevant.

**B. Substantial Evidence Supports the Trial Court’s Finding that VSS Consented to the Use of its Funds to Purchase the Property in Prehar’s Name**

VSS prevailed on only one claim—conversion. The Supreme Court has described the requirements for proving the tort of conversion in the context of money.

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<sup>7</sup> *Id.* at pp. 5-6

A conversion is the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it. Money, under certain circumstances, may become the subject of conversion. However, there can be no conversion of money unless it was wrongfully received by the party charged with conversion, or unless such party was under obligation to return the specific money to the party claiming it.<sup>8</sup>

Thus, to prevail on its claim for conversion, VSS had the burden of proving that Prehar either wrongfully received money from VSS or that Prehar had an obligation to return that specific money to VSS.

In the trial court, and on this appeal, VSS has consistently maintained that Prehar wrongfully received the money when he used it as part of the purchase price of the property. The trial court rejected this claim, and so should this Court, because there is more than substantial evidence supporting the trial court's factual finding that VSS consented to the use of VSS's funds toward the purchase price of the property. At the same time, there is no evidence that VSS

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<sup>8</sup> *Public Utility Dist. No. 1 of Lewis County v. Washington Public Power Supply System*, 104 Wn.2d 353, 378, 705 P.2d 1195 (1985)

objected to this use of its funds in this manner or that it otherwise withheld consent.

VSS is a nonprofit charitable organization that can only act through its authorized agents. As Respondent concedes in its brief,<sup>9</sup> Washington’s governing statute imbues the directors of such corporations with control over its actions. As RCW 24.03.095 states: “The affairs of a corporation shall be managed by a board of directors.” Thus, the directors of VSS—and only the directors of VSS—had the authority to decide whether VSS’s funds should be contributed to Prehar’s purchase of the building. And, as shown in Appellants’ Opening Brief, VSS only ever had two directors—Jagjit Prehar and Harpreet Minhas.

The record makes clear that Jagjit Prehar agreed that VSS should contribute its funds. What the record does not show is whether Harpreet Minhas also consented. But it was not Prehar’s burden to prove that Minhas also consented; it was

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<sup>9</sup> RB, p. 35

VSS's burden to prove that Minhas did not consent, because it was VSS's burden to prove that Prehar used that money "wrongfully,"—i.e., without proper consent. VSS, however, never called Minhas as a witness at the trial, never introduced a single exhibit indicating Minhas did not consent, and VSS did not introduce any evidence indicating that Minhas did not consent. Accordingly, Respondent utterly failed to prove this theory of conversion to the trial court.

In addition, the evidence shows that Parmjit Nagra also consented to using VSS's funds to purchase the property in Prehar's name. Parmjit Nagra was an original donor to VSS, he was an authorized signer on VSS's bank account, he was the treasurer of VSS, and he was one of the original buyers in the purchase and sale agreement<sup>10</sup> And Nagra signed the addendum to that agreement, removing himself as a buyer and naming Prehar the sole purchaser of the property.<sup>11</sup> Nagra understood that VSS's money was being used as part of the

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<sup>10</sup> Exhs. 52, 64, and 65

<sup>11</sup> Exh. 68

purchase price, and he indicated his agreement to Prehar taking sole title when Nagra signed the addendum to this effect.

Thus, even if one looked to the officers of VSS for indications of consent, the only evidence is that Prehar and Nagra both agreed that VSS's funds should be used for the purchase of the building. Respondent assigns error to the trial court's factual finding that "[a]t the time the funds were applied to the real estate purchase the managing members of VSS approved of the use and anticipated the use of the funds for the purchase of the real property in Defendant's name." But the record makes clear that this finding is supported by substantial evidence, whether the trial court's reference to "managing members" is meant to refer to the directors or the officers of VSS. It is true that VSS—as a corporation and not a limited liability company—does not have "managing members," as that term is used in the context of limited liability companies. But this does not change the thrust of the trial court's factual

finding, which is that VSS consented to its funds being used to help Prehar buy the property.

In light of these findings, it is clear that Respondent failed to prove its theory of conversion—that Prehar converted the funds when he bought the property. Instead, the trial court based its decision on a theory of conversion that Respondent never proved, argued, pled, or even suggested—that Prehar wrongfully retained the funds after VSS supposedly demanded their return. As shown in Appellants’ Brief, however, there is no substantial evidence to support any such finding by the trial court. In its response, VSS does not even attempt to show that the trial court’s theory of conversion was supported by any substantial evidence. Instead, Respondent seeks affirmance of the outcome based on numerous other theories of liability. As shown below, however, these theories do not fit the facts of this case.

**C. The Judgment Should Not be Affirmed  
Under Any of the Alternative Theories  
Advanced by VSS**

**1. Restitution Based on Unjust Enrichment  
is Not Warranted**

The first alternative theory raised by VSS is “restitution based on unjust enrichment.” Unable to point to any evidence that VSS ever demanded the return of its money, VSS argues that Prehar had some free-floating obligation to return the money anyway. According to VSS, the elements of this claim are the defendant’s receipt of a benefit at plaintiff’s expense, the defendant’s knowledge of receipt of that benefit, and “the circumstances make it unjust for the defendant to retain the benefit without payment.”<sup>12</sup>

The first two elements are not controverted; VSS extended its money toward the purchase of the property, and Prehar obviously knew it. It is the third element that does not fit the facts of this case, because VSS received substantial benefits in exchange for its money and Prehar expended

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<sup>12</sup> RB, p. 11

substantial personal funds in reliance on VSS's consent. In summary, VSS accomplished its purpose, which was the establishment of a Gurudwara in Vancouver, and Prehar paid an additional \$370,000 toward the purchase of the property that housed the Gurudwara, and he donated roughly \$150,000 more over the ensuing years to fund the Gurudwara.<sup>13</sup>

In sum, given all the facts of this case, there is nothing unjust about Prehar not returning the money VSS put toward Prehar's purchase of the property. VSS advances eight reasons why it would be unjust for Prehar to retain the benefit of this money, but none of them have merit. First, VSS argues that its "funds were to be used to purchase a building where members of the Sikh community were to worship."<sup>14</sup> But that is exactly how the funds were used. It is uncontroverted that after Prehar purchased the property, Prehar—with the help of many others—remodeled and renovated the building into a

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<sup>13</sup> Exh. 91

<sup>14</sup> RB, p. 12

Gurudwara that served as a place for the Sikh community to congregate and worship.

As mentioned above, in addition to paying \$370,000 of his own money to purchase this building—on top of the \$30,000 that he had already donated through VSS—Prehar donated substantial sums toward the remodeling of the building before it opened, and he then donated additional sums toward the operation and maintenance of the Gurudwara. In all, from the time the building was purchased in 2013, through the time that this lawsuit was filed in January of 2016, Prehar donated roughly \$180,000 so that the Sikh community could have a place to worship.<sup>15</sup> And the Sikh community was able to use the property as a Gurudwara, rent free, for roughly two-and-a-half years before this lawsuit was filed. Thus, VSS received substantial benefits, and Prehar bore substantial burdens, as part of their joint effort to establish a Gurudwara in Vancouver.

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<sup>15</sup> Exh. 91, RT 480-483

Second, VSS argues it would be unjust for Prehar to retain the benefit of the VSS funds because “community members believed that the property purchased was going to be titled in the name of VSS.” As noted above, however, even if one could prove through competent evidence what the members of some undefined “community” believed, it is irrelevant. Liability cannot be based on what the “community” believed about a specific transaction. The only question is what VSS believed, and VSS clearly knew that title was going to be held by Prehar.

Third, VSS cites the trial court’s finding that the parties intended to negotiate an agreement under which title would go to VSS. Prehar did try to negotiate such an agreement when he offered to sell the property in exchange for \$490,000. Neither VSS nor anyone else accepted this offer, nor did anyone else ever make any type of counteroffer. Moreover, a mere offer to sell the property—which no one accepts—does not mean it would be unjust for Prehar to retain title to the property.

Fourth, VSS argues that Prehar was asked to transfer title to VSS “when the nature of the transaction was fully understood.” The question is, fully understood by whom? VSS always fully understood the nature of the transaction. The Respondent’s Brief cites only to Manjit Singh’s testimony in support of this argument. But Mr. Singh was never an officer or director of VSS, and he was never a party to any purchase and sale agreement. Thus, his “understanding” of the transaction is immaterial. Moreover, it is not unjust for Prehar to retain title simply because Mr. Singh asked him to transfer it to VSS. By that time, Prehar spent hundreds of thousands of dollars on purchasing, remodeling, and maintaining the building, and it would be grossly unfair if he were required to simply give the property to VSS.

Fifth, VSS asserts that Prehar should return the funds because “he stood in front of the whole community and announced that he was going to transfer title to the community but then failed to do so.” But this assertion is false. VSS cites

to page 253 of the Reporter’s Transcript to support this assertion, but that testimony actually shows that it was Manjit Singh—not Jagjit Prehar—who stood in front of the “whole community” and made this announcement. Under questioning by Respondent’s counsel, Mr. Singh testified as follows:

Q. So you asked Jagjit when he was going to transfer the property to VSS and he said next week.

A. Every time he saying that we are doing this, doing this. And then *I* announced on the stage that we are going to do this thing. The community member all want this.

Q. Okay. So then *you*, in front of the whole temple membership, get up and announce that he said he was going to transfer the property.

A. Right.<sup>16</sup>

Sixth, VSS argues it would be inequitable for Prehar to retain the benefit because he “revoked an offer to sell the property to VSS while other community members were still considering it.”<sup>17</sup> As noted above, however, just as making an

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<sup>16</sup> RT 253:17-254:1 (emphasis added)

<sup>17</sup> RB, p. 12

offer to sell the property does not make it unjust for Prehar to retain title, neither does revoking such an offer. In addition, even though the offer was revoked, nothing stopped VSS or anyone else from making a new offer to purchase the property from Prehar.

Seventh, VSS argues Prehar should have unilaterally deeded a share of ownership to VSS in August of 2014, instead of offering to sell the property. But it would not have been within Prehar's sole discretion to deed a portion of the property to VSS. The seller still held a deed of trust on the entire property to secure the \$160,000 note from Prehar, and it would have taken the seller's consent before Prehar could give away portions of his ownership. Moreover, there is no evidence that anyone ever asked Prehar to deed a *portion* of the ownership to VSS or any other entity.

Eighth, and finally, VSS argues it would be inequitable for Prehar to retain the money from VSS because Prehar was a director of VSS. But Prehar's status as a director of VSS does

not make it inequitable for him to retain the benefit of VSS's contribution toward the purchase price of the property. VSS received the same benefits from this transaction, and Prehar bore the same burdens, regardless of Prehar's position as a director.

In sum, the facts do not support a claim for "restitution based on unjust enrichment." The record makes clear that VSS enjoyed many benefits, and Prehar bore many burdens, from their joint efforts to purchase the property and convert it to be used as a Gurudwara for years. Any benefit Prehar received from the use of VSS funds to help purchase the property must be seen in the context of the entire plan, in which Prehar donated far more to keep the Gurudwara going than he ever received from VSS to purchase the property. Respondent argues that Prehar deserves no credit for those substantial sums because they were technically donated to GSV rather than VSS, but this elevates the form over the substance of what really transpired. Because Prehar was not unjustly enriched, this

Court should reject Respondent's request to affirm the judgment based on this theory.

## **2. Money Had and Received Does Not Fit the Facts**

As shown directly above, the facts of this case do not fit the theory of "restitution based on unjust enrichment."

Respondent takes a second bite at the same apple when it argues that the judgment should be affirmed on the theory of "money had and received." But this is just a different label for essentially the same theory. As Respondent's Brief states, the doctrine of money had and received is "based on notions of restitution and is founded on the principle that no one ought to unjustly enrich himself at the expense of another."<sup>18</sup> As shown above, however, Prehar has not been unjustly enriched.

Respondent seeks to bolster this theory by claiming that the "trial court clearly believed that considerations of equity and good conscience required the Prehars to pay the money

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<sup>18</sup> RB, p. .23

over to VSS.”<sup>19</sup> But this misstates the trial court’s findings of fact and conclusions of law. The trial court made no findings about the equities, other than to reject the affirmative defense of equitable estoppel as not proved. But rejecting an equitable defense does not mean the judgment is based on equitable grounds. In fact, conversion is not an equitable claim, it is a tort claim. As the Supreme Court has observed: “The tort of conversion is ‘the act of wilfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it.’”<sup>20</sup> It is not based on the equities of the situation; instead, it is based on exercising any unwarranted dominion over plaintiff’s property, regardless of justness or unjustness of those actions. As the Supreme Court has observed:

The foundation for the action of conversion rests neither in the knowledge nor the intent of the defendant. It rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff

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<sup>19</sup> RB, p. 24

<sup>20</sup> *Kruger v. Horton*, 106 Wn.2d 738, 743, 725 P.2d 417 (1986) (citation omitted)

from which injury to the latter results. Therefore neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action.<sup>21</sup>

Finally, when reviewing the cases cited by VSS in support of these equitable theories, one thing becomes clear—in all of those cases there was no reason whatsoever why the defendant should have been allowed to keep the plaintiff's money. For example, in the leading case of *Seekamp*, the plaintiff gave the defendant \$1,500 to invest in onions for him.<sup>22</sup> When that investment was sold, it turned a profit of \$2,720, yielding a total sum of \$4,220. The defendant then took that money and invested it in potato futures, suffering a heavy loss that wiped out the gains on the onions, and then some. The jury found, however, that the plaintiff never authorized the defendant to re-invest his money in potato futures. The jury found the defendant had converted the sum of \$5,500 for conversion, but this sum was not supported by the

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<sup>21</sup> *Judkins v. Sadler-Mac Neil*, 61 Wn.2d 1, 4, 376 P.2d 837 (1962) (quoting *Poggi v. Scott*, 167 Cal. 372, 375, 139 P. 815 (1914))

<sup>22</sup> *Seekamp v. Small*, 39 Wn.2d 578, 237 P.2d 589 (1951)

evidence. Rather than remand for a new trial, however, the Supreme Court ordered the trial court to issue a remittitur in the amount of \$4,220. This result makes sense, because absent the authority to re-invest these funds in potatoes, the defendant should have simply given this amount to the plaintiff once the onion investment was sold. As the Supreme Court concluded:

The jury having found against respondent on the issue of authorization to reinvest the proceeds of the onion sale in potato futures, the evidence clearly establishes that respondent had and received \$4,220 to which appellant was entitled. We know of no reason why appellant should not recover it in this action.<sup>23</sup>

The facts in *Seekamp* are in stark contrast to the trial court's finding, that VSS consented to Prehar's use of its funds to purchase the property to be converted into a Gurudwara. Prehar relied on this consent in putting an additional \$370,000 towards the purchase of the building, and in donating tens of thousands of dollars more to fund the Gurudwara's operations over the next several years. The defendant in *Seekamp* never had any consent to invest the plaintiff's money in a different

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<sup>23</sup> *Id.* at 584.

investment, and he did not expend any of his own money in reliance on plaintiff's consent.

In sum, the theory of "money had and received" is just another label for the theory of "restitution based on unjust enrichment." And regardless of the label, this theory does not fit the facts in this case. As a result, this theory does not provide a basis for affirming the trial court's ruling.

### **3. Prehar Did Not Breach His Fiduciary Duty to VSS**

The trial court expressly found that Prehar did not breach his fiduciary duty to VSS. "Plaintiff's evidence does not show that defendant's [sic] misrepresented, misappropriated or breached their fiduciary duties to VSS."<sup>24</sup> Respondent does not assign error to this finding. Nevertheless, Respondent urges this court to essentially reverse the trial court and find that Prehar breached his fiduciary duty to VSS.

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<sup>24</sup> CP 220

RAP 10.3(b) requires that “[i]f a respondent is also seeking review, the brief of respondent must state the assignments of error.” As the Supreme Court has held: “It is well settled that a party’s failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error.”<sup>25</sup> Accordingly, the Court should not consider Respondent’s argument regarding Prehar’s alleged breach of fiduciary duty.

Even if the Court were to consider this argument, it should reject it, for several reasons. The primary basis for Respondent’s argument is that VSS did not ratify the decision to use VSS funds to help purchase the property in Prehar’s name. But no such ratification is necessary if the corporation approves of the transaction in the first place. Ratification becomes an issue only if a director or officer of the corporation takes some act that exceeds his or her authority in some way.

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<sup>25</sup> *Emmerson v. Weilep*, 126 Wn.App. 930, 110 P.3d 214, 218 (2005)

Ratification of that action by the corporation can then be pled as an affirmative defense. Prehar did not plead ratification as an affirmative defense, nor did he need to prove ratification, because his actions did not exceed his authority as a director and officer of VSS. As the trial court found, Prehar had the authority to use VSS funds to pay a portion of the purchase price. Thus, all of Respondent's arguments regarding ratification are beside the point.

In a similar fashion, Respondent notes that all shareholders must consent to the "appropriation" of corporate assets by a corporate fiduciary. By analogy, argues Respondent, all the "members" of VSS would have to have approved of this use of VSS funds. As noted in the beginning of this brief, however, VSS never had any members. As a result, all of Respondent's arguments regarding the lack of consent by the "members" of VSS are also beside the point.

In sum, Respondent has failed to assign error to the trial court's conclusion that Prehar did not breach any fiduciary duty

to VSS by using its funds to pay for a portion of the purchase price, and plaintiff has failed to show how that conclusion was not supported by any substantial evidence. Instead, Respondent simply assumes that Prehar breached his fiduciary duty and proceeds to argue that Prehar has failed to prove various potential affirmative defenses to such a claim. Because Prehar was never obligated to plead or prove ratification by VSS, or that all “members” of VSS consented to this transaction, Respondent’s effort to resurrect its breach of fiduciary duty claim fails.

#### **D. Prehar Proved His Equitable Estoppel Defense**

Clear, cogent, and convincing evidence shows that Prehar should prevail on his equitable estoppel defense; VSS consented to the use of the funds, Prehar relied on that consent in going forward with the purchase of the property and the funding of the Gurudwara, and Prehar would suffer substantial injury if VSS were allowed to repudiate that consent years later,

long after Prehar relied on that consent to his detriment. If VSS had not consented to the use of its money, then Prehar would not have spent an additional \$370,000 to purchase the property and Prehar would not have donated more than \$100,000 to renovate and operate the building as a Gurudwara, rent free, until the day this suit was filed. These facts are not disputed by any evidence in the record. Nevertheless, Respondent makes several meritless arguments against this affirmative defense.

First, VSS argues that the trial court's finding of consent was based on applying a lower standard of proof and, therefore, this finding cannot be applied to the equitable estoppel defense. But the appellate courts can make their own decision as to whether a fact has been proved by clear, cogent, and convincing evidence. In other words, when a trial court concludes that a party has failed to meet his or her burden of proof, the Court of Appeals can always disagree, based on its own review of the evidence.

Second, Respondent argues that equitable estoppel does not apply because VSS's representation "would have to include an indication that the Prehars could take title to the property in their own names."<sup>26</sup> But this is exactly what VSS indicated when it authorized its funds to be used to help purchase the property. All parties to the purchase agreement, which included VSS's president Prehar and VSS's treasurer Nagra, signed off on the amendment making Prehar the sole purchaser of the property. Simply put, there is no evidence that VSS was unaware of this amendment, nor could it have been, yet no director or officer of VSS objected to the property being purchased by Prehar.

Third, Respondent argues that Prehar would not be injured if he were forced to return the funds to VSS. But this argument requires the Court to completely disregard the extent of Prehar's additional donations after the purchase was completed and to disregard the Gurudwara's use of the property

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<sup>26</sup> RB, p. 27

rent-free. Respondent argues that the donations gave Prehar a tax benefit. While that may be true, it does not mean Prehar would suffer no economic harm, because the deduction for a charitable contribution only benefits the taxpayer in an amount proportionate to his or her tax bracket—it does not make the taxpayer whole, as though no donation had been made.

Third, Respondent argues Prehar is not entitled to raise an equitable estoppel defense because his lack of “clean hands.” But this argument is premised on the false and unproved notion that Prehar acted inappropriately in using VSS’s funds to help purchase the property. As the trial court found, however, Prehar had VSS’s consent and did nothing wrong at the time he applied those funds toward the purchase price.

Between the trial court’s finding of VSS’s consent, and the undisputed evidence of Prehar’s actions taken in reliance on VSS’s consent, which were to his economic detriment, the defense of equitable estoppel has been proved by clear, cogent,

and convincing evidence. The Court, therefore, could reverse the judgment on this ground, as well.

### **E. Respondent's Arguments Regarding Prejudgment Interest Lack Merit**

In their opening brief, Appellants demonstrated that the trial court miscalculated the amount of prejudgment interest, given the principal amount, rate, and dates that the court used to calculate that interest. The trial court also applied the wrong rate to the post-judgment interest.

In its brief, Respondent does not even try to explain how trial court's calculation of prejudgment interest could be correct. Instead, Respondent argues that Appellant is precluded from raising this issue on appeal because Appellant did not bring a post-judgment motion for reconsideration to the trial court. At the same time, however, Respondent also seeks review of the trial court's award of prejudgment interest, even though Respondent did not raise its issue to the trial court. Accordingly, the Court should exercise its discretion to review

the trial court's calculation of prejudgment interest, as well as the rate it applied to post-judgment interest.

As for the rate of post-judgment interest, Respondent argues that a judgment based on a conversion claim should not be governed by RCW 4.56.110(3)(b), which applies to any judgment founded on "tortious conduct." But conversion has uniformly and consistently been treated as a tort by the courts. Dozens of appellate and Supreme Court decisions refer to the "tort of conversion."<sup>27</sup> Respondent's cites to the *Stevens* case to support its argument, but that case dealt with a claim under the Minimum Wage Act, which is purely statutory claim, not a tort claim, that sounds more in contract than in tort.<sup>28</sup>

No Washington Court has squarely addressed the issue of whether RCW 4.56.110(3)(b) applies to judgments based on

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<sup>27</sup> See e.g., *Kruger v. Horton*, 106 Wn.2d 738, 743, 725 P.2d 417 (1986) (quoting *Judkins v. Sadler-Mac Neil*, 61 Wn.2d 1, 376 P.2d 837 (1962)); *Overseas Management, LTD. v. Shtikel*, 105 Wn.App. 80, 18 P.3d 1144, 1147 (2001); and *Bremerton Central Lions Club, Inc. v. Manke Lumber Co.*, 25 Wn.App. 1, 6, 604 P.2d 1325 (1979)

<sup>28</sup> *Stevens v. Brink's Home Security, Inc.*, 162 Wn.2d 42, 169 P.3d 473 (2007)

conversion. But the U.S. District Court for the Western District of Washington has very recently addressed this question. In that case, the District Court applied RCW 4.56.110(3)(b) to a judgment based on conversion. Noting that the prevailing party’s arguments—that the losing party had “wrongfully retained” certain overpayments—“mirror a conversion claim,” the District Court equated the claim with the “tortious conduct” language used in the statute.

Thrifty’s counterclaim was based on erroneous payments not required by the contracts: plaintiffs’ liability arose when it was unjustly enriched and/or failed to return what, in equity and good conscience, should have been paid over. Thus, the 5.25% interest rate [called for by RCW 4.56.110(3)(b)] applies.<sup>29</sup>

While the *Nicholson* decision is not authoritative, its reasoning is persuasive. If the Court agrees, then the trial court erred by applying the rate of 12% to prejudgment interest. Accordingly, if the judgment is affirmed in any respect, the

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<sup>29</sup> *Nicholson v. Thrifty Payless, Inc.*, W.D. Wash., January 8, 2018, Case No. C12-1121RSL

Court should direct the trial court to amend the judgment consistent with RCW 4.56.110(3)(b).

### **III. Response to Respondent's Cross-Appeal**

In its cross-appeal, Respondent assigns three errors to the trial court. First, Respondent argues the trial court erred when it found that the “managing members” of VSS approved of using its funds for the purchase of the building. This issue has already been discussed at length in this brief, and there would be no point in repeating that discussion here. Suffice it to say that, for the reasons already set forth above, Appellants urge the Court to reject this assignment of error.

Respondent's next assignment of error is that the trial court erred when it rendered judgment in the amount of \$85,000, rather than \$90,000, because the trial court erroneously failed to include in its judgment the \$5,000 earnest money deposit, which also came from VSS's account.

It should be noted that Respondent never raised this issue with the trial court in any type of post-judgment motion. Thus, under RAP 2.5(a), the Court could refuse to review this issue. But Appellants have no objection to the Court reviewing this issue.

Moreover, Appellants cannot think of any reason why the trial court would find that the \$85,000 of VSS funds used to close the purchase was converted but would not find that the \$5,000 of VSS funds used as the earnest money deposit would not have been converted. Accordingly, if the judgment were affirmed, the principal amount should be \$90,000, not \$85,000.

Finally, Respondent argues the trial court should have started the running of prejudgment interest when the funds were first used to purchase the building, instead of when VSS allegedly demanded that they be returned. As noted above, Respondent never raised this issue with the trial court. Nevertheless, it would make no sense for the trial court to find the conversion occurred when Prehar refused to return the

money but then calculate prejudgment interest from the date VSS consented to the funds being used. As a result, if the judgment were affirmed, any prejudgment interest should only start running after VSS supposedly demanded the return of its funds.

#### **IV. Conclusion**

For the foregoing reasons, Appellants respectfully request that the judgment against them be reversed and vacated, with instructions to enter judgment in favor of Appellants, and that Respondent's cross-appeal be denied in its entirety.

Respectfully submitted July 23, 2018

*s/ Steven E. Turner*

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## CERTIFICATE OF SERVICE

**Brief on:** I hereby certify that I served the foregoing **Appellants' Reply**

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by the following indicated method or methods:

- E-mail.**
- Facsimile communication device.**
- First-class mail, postage prepaid.**
- Hand-delivery.**
- Overnight courier, delivery prepaid.**

DATED this 23<sup>rd</sup> day of July, 2018

*s/ Steven E. Turner*

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