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NO. 50722-6-II

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

BALWINDER DEOL, et al

Plaintiffs/Respondents,

vs.

JAGJIT PREHAR, et ux et al,

Defendants/Appellants,

APPEAL FROM THE SUPERIOR COURT

HONORABLE DANIEL STAHNKE

RESPONDENT'S BRIEF

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INTRODUCTION

Members of the Vancouver Sikh community formed Vancouver Sikh Society (VSS) as a nonprofit corporation for the purpose of purchasing property to be used as their temple. Jagjit Prehar was one of its directors. Mr. Prehar took money that had been contributed to VSS by its members to purchase real estate titled in the name of himself and his spouse. The Prehars contended that they had no obligation to account for or return that money. The trial court correctly ruled otherwise.

RESPONSE TO DEFENDANTS' ASSIGNMENT OF ERROR AND ISSUES PRESENTED

Response to Assignment of Error: The trial court did not err by granting judgment on behalf of VSS.

Issues Concerning this Assignment of Error

1. Was Mr. Prehar guilty of conversion?

2. Is a demand for return necessary for Mr. Prehar to be guilty of conversion?

3. Did Mr. Prehar breach his fiduciary duty to VSS by using its funds to purchase property in the name of himself and his spouse?

4. Is VSS entitled to restitution of the money Mr. Prehar took under the doctrine of money had and received?

5. Can the Prehars rely on the doctrine of estoppel when the trial court found that they had not met their burden of proof?

6. Does the trial court's judgment work an impermissible forfeiture?

7. Did the Prehars properly preserve the objections they are now making to the trial court's rulings on both prejudgment and postjudgment interest?

8. Did the trial court properly set postjudgment interest at 12% per annum?

ASSIGNMENT OF ERROR ON CROSS APPEAL AND ISSUES PRESENTED

Assignment of Error: The trial court erred in part in the entry of the Judgment and Order following trial findings of fact and decision on civil claims (the Judgment).

Issues Concerning this Assignment of Error

1. Was the trial court's statement to the effect that the managing members of VSS approved the taking of the corporations' funds for the purchase of the property supported by substantial evidence?

2. Should the trial court also have entered judgment for the $5,000.00 of earnest money that was taken from VSS' funds?

3. Should prejudgment interest have run from a date earlier than August 28, 2014?

STATEMENT OF THE CASE[1]

VSS was formed as a nonprofit corporation in 2012 to receive donations from its members for the purchase of a building to conduct religious activities. The corporation has had many members including those who contributed money to help fund the purchase. (RP 80) Sixteen of them executed a corporate resolution in January of 2016 when this litigation began. (Ex. 84)

In 2011-12, VSS negotiated to purchase a building at 4700 N.E. St. James Road in Vancouver. (Ex. 48) Donations were made to help in that effort. These donations were placed in bank account that VSS opened at a Wells Fargo Branch in downtown Vancouver. The purchase attempt ultimately failed because financing could not be arranged. Some of the people who had made donations asked for and received their money back. By the spring of 2013, the account had a balance of $91,994.00. (CP 218)

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[1] References will be made to unchallenged findings of fact in the Judgment as well as to the Clerk's Papers and the Report of Proceedings. The findings of fact are not numbered. They will be referred to by a Clerk's Papers reference.

By 2013, Jagjit Prehar was identified as a director and president of VSS; Harpreet Minhas was a director and a secretary: and Parmjit Nagra was treasurer. Mr. Minhas is Mr. Prehar's nephew. (RP 46-47; RP 521; Ex. 16; Ex. 51; CP 218) Mr. Prehar and Mr. Nagra were also listed as signers on the bank account at Wells Fargo. (Ex. 52)

The parties made another attempt to purchase the same building in 2013. In a document entitled Commercial and Investment Real Estate Purchase and Sale Agreement (the PSA) dated April 5, 2013, Mr. Prehar, his spouse Ashwinder Prehar, Mr. Nagra, and Maninderjits Kullar as purchasers contracted to purchase the land and building for $460,000.00.[2] The sum of $300,000.00 was due all in cash at closing. The PSA called for the buyers to deposit $5,000.00 of earnest money. The earnest money was deposited. It came from the VSS account at Wells Fargo. In a subsequently executed addendum executed on April 25, 2013, the seller agreed to take a promissory note from the purchasers for the balance of $160,000.00. The note was to be secured by a deed of trust on the property. (Ex. 65-66 (RP 433; RP 520; Ex. 1; Ex. 37—answer to Interrogatory No. 11; Ex. 67)

On May 3, 2013, another addendum was signed that removed Mr. Nagra and Mr. Kullar as purchasers. (Ex. 68) Mr. Prehar represented that

[2] The address on the 2012 agreement is 4700 N.E. St. Johns while the address on the PSA is 4700 N.E. St. James. The difference is believed to be inadvertent. The two streets are next to each other. Both agreements were meant to apply to the same property.

this change was necessary to facilitate obtaining a loan for $295,000.00 of the down payment. (RP 82, 717) It was understood, however, the Prehars were not going to be the only title holders after the sale closed, and that VSS was to be placed in title. (RP 78, 258, 276, 717) Other members of the Sikh community had the same understanding. (RP 253, 259, 280, 288-89)

The transaction was subsequently closed on or about June 28, 2013, with the Prehars taking title. The Prehars executed the promissory note that had been called for in the April 25, 2018, addendum. They also deposited the cash necessary to pay the remainder of the purchase price. The settlement statement shows that this included the sum of the $85,000.00. It came from the funds that had been deposited in the VSS account at Wells Fargo as donations. (Ex. 69-70) Mr. Prehar had withdrawn the $85,000.00 from the Wells Fargo account on May 2, 2013. (Ex. 32; Ex. 37—answer to Interrogatory No. 11; Ex. 67; RP 486; RP 496-97; CP 219) For his part, Mr. Nagra never told Mr. Prehar that he could use money donated to VSS to purchase the property in his own name. Rather, VSS money was to be used to purchase property in the name of VSS. (RP 86) Tajinder Pal Singh, also known as Gurmel Singh, had donated money to VSS and not sought a refund. He also believed that the property was going to be titled in VSS' name. (RP 62-70; RP 274-76; Ex. 45-46)

Meanwhile, Mr. Prehar had allowed VSS to be administratively dissolved by the Secretary of State as of May 2013.[3] (CP 218) He then formed Gurudwara Sahib Vancouver, WA, Inc. (GSV) as a nonprofit corporation on July 14, 2013. (CP 218; Ex. 71)

Members of the community pressed Mr. Prehar to title the property in the name of VSS. In August of 2014, the Prehars offered to sell the property. Two options were given. One involved the Prehars selling the property for $490,000.00. Mr. Nagra, on behalf of the community, requested two weeks to consider the matter. In the interim, the offer was revoked. Mr. Prehar then stated that he wanted $800,000.00 for the property. (Ex. 73; RP 112; CP 219)

Tensions in the community rose due to the status of the property. Mr. Prehar ultimately issued notices to certain community members indicating that they were not permitted on the property and would be subject to criminal charges for trespass if they did not comply with the notice. (Ex. 77; CP 219)

This suit was filed on January 14, 2016, on behalf of VSS. (CP 1) An amended complaint was filed on behalf of members of VSS on January 26, 2016. (CP 79-86) The Prehars answered the amended complaint and, as

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[3] When this issue came to light, steps were taken to reinstate the corporation on January 20, 2016. (CP 218)

pertinent here, alleged the affirmative defense of equitable estoppel. (CP 146-55)

The matter was tried to the Court on July 17-19, 2017. On August 1, 2017, the trial court signed the Judgment that it prepared. The Judgment was filed the next day. The trial court determined that the Prehars had converted $85,000.00 of funds belonging to VSS and granted judgment against the Prehars in that amount. The Judgment also awarded prejudgment interest on that sum in the amount of $33,355.00. The Judgment states that prejudgment interest was to run from August 28, 2014, at the rate of 12% per annum. (CP 217-23) Neither side moved for reconsideration of the trial court's ruling. The Prehars then appealed, and the Plaintiffs cross appealed.

ARGUMENT ON DEFENDANT'S ASSIGNMENT OF ERROR

I. Standard of Review.

This matter was tried to the Court. The appellate court reviews the trial court's findings of fact by asking whether those findings are supported by substantial evidence and whether those findings support the trial court's conclusions of law. Conclusions of law are reviewed *de novo. Casterline v. Roberts,* 168 Wn.App. 376, 381, 284 P.3d 743 (2012)

The Judgment includes a portion entitled Findings of Fact and another section entitled Conclusions. Some of the statements in the Conclusions section could be considered findings of fact. A finding of fact

describes something that occurred or existed while a conclusion of law involves legal reasoning from facts in evidence. *Casterline v. Roberts, supra,* 168 Wn.App. at 382-3 Findings of fact mislabeled as conclusions of law are reviewed as findings of fact, and conclusions of law mislabeled as findings of fact are reviewed as conclusions of law. *Willener v. Sweeting,* 107 Wn.2d 388, 394, 730 P.2d 45 (1986); *Robel v. Roundup Corp.,* 148 Wn.2d 35, 66, 59 P.3d 816 (2002); *Scott Excavating Vancouver, LLC v. Winlock Properties, LLC,* 176 Wn.App. 335, 341-42, 308 P.3d 741 (2013)

In any event, Defendant has not assigned error to any factual statement made in either section. Therefore, all of the trial court's findings are verities on appeal as far as Defendant's argument's are concerned. *Kitsap County Consolidated Housing Authority v. Henry-Livingston,* 196 Wn.App. 688, 697, 385 P.3d 188 (2016)

As will be discussed below, the unchallenged findings of fact support the judgment made against the Prehars.

II. <u>The Prehars Are Liable for $85,000.00.</u>

a. <u>Introduction.</u>

The trial court ruled that the Prehars had converted the $85,000.00 taken from VSS funds and applied to the purchase of the property. The findings of fact that the trial court made support that conclusion.

Even if conversion is not made out by the facts, the judgment against the Prehars can easily be supported utilizing other theories of liability not discussed in the trial court's Judgment. A judgment may be affirmed on any grounds supported by the record. *Nast v. Michaels,* 107 Wn.2d 300, 307, 730 P.2d 54 (1986); *LK Operating, LLC, v. Collection Group, LLC,* 181 Wn.2d 48, 73, 331 P.3d 1147 (2014); *Meade v. Nelson,* 174 Wn.App. 740, 751-52, 300 P.3d 828 (2013) This rule is applicable even when the ground for affirmance was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. RAP 2.5(a); *Port of Seattle v. Lexington Insurance Co.,* 111 Wn.App. 911, 920, 48 P.3d 334 (2002) The record is more than sufficient here to justify affirmance on any of the other theories mentioned.

At the end of the day, the Prehars are asking the Court to relieve them from any liability for taking funds from VSS and purchasing real property in their names only. Such a result is simply not justified under the law and the facts of this case.

a. Mr. Prehar Was Guilty of Conversion.

It is undisputed that Mr. Prehar took $85,000.00 from the VSS bank account at Wells Fargo and applied that sum to the purchase of the property in his name. The trial court found this to be the case. (CP 219) This is sufficient to render the Prehars liable for conversion.

Conversion is the willful interference with a chattel without lawful justification whereby a person entitled to possession of the chattel is deprived of its possession. Wrongful intent is not an element of conversion, and good faith is not a defense. Therefore, neither good nor bad faith, neither care nor negligence, and neither knowledge nor ignorance are the gist of an action for conversion. *Public Utilities District of Lewis County v. WPPSS,* 104 Wn.2d 353, 378, 705 P.2d 1195 (1985); *Brown v. Brown,* 157 Wn.App. 803, 817-18, 239 P.3d 602 (2010) The plaintiff must, however, have some property interest in the item converted. *Meyers Way Development Limited Partnership v. University Savings Bank,* 80 Wn.App. 655, 675, 910 P.2d 1308 (1996)

In our case, money in the amount of $85,000.00 belonging to VSS was converted. Money can be the subject of an action for conversion if it is capable of being identified, as when delivered at one time, by one act and in one mass. *Seekamp v. Small,* 39 Wn.2d 578, 583-84, 237 P.2d 589 (1951); *Brown v. Brown, id.* For example, a secured creditor was found to have a sufficient interest in the proceeds of the sale sufficient to maintain a conversion action. *Meyers Way Development Limited Partnership v. University Savings Bank, supra.* The Court ruled in *Brown v. Brown, supra,* that a party's receipt of money from the proceeds of a reverse mortgage meant for the mother of her boyfriend could also amount to conversion. And

progress payments meant for subcontractors were held to be a proper subject of a conversion claim in *Westview Investments, Ltd., v. U.S. National Bank Association,* 133 Wn.App. 835, 138 P.2d 638 (2006) Since the money was taken from the VSS account, it can clearly be identified. VSS has a property interest in the money in that account. Therefore, the money Mr. Prehar took to fund the purchase can be the subject of conversion.

Money can be the subject of conversion if the party charged with conversion wrongfully received the money, or if that party had an obligation to return the money to the party claiming it. *Brown v. Brown, id.* In this case, Mr. Prehar had an obligation to return the money.[4] His obligation to return is one of restitution based on unjust enrichment. This is the method of recovery for the value of the benefit retained absent any contractual relationship when notions of fairness and justice require it. It is present when one retains money or benefits which in equity and justice belong to another. Three elements are required to sustain such a claim. These are the defendant's receipt of a benefit at plaintiff's expense; the defendant's knowledge of the receipt of the benefit; and the circumstances make it unjust for the defendant to retain the benefit without payment. *Young v. Young,* 164 Wn.2d 477, 484-85, 191 P.3d 1258 (2008), citing *Bailie Communications,*

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[4] Mr. Prehar's receipt of the money was also wrongful. It violated his fiduciary duty to VSS and was not sufficiently ratified as will be discussed below.

Ltd., v. Trend Business Systems, Inc., 61 Wn.App. 151, 160, 810 P.2d 12 (1991) Where unjust enrichment is present, the plaintiff is entitled to restitution. *Young v. Young, supra,* 164 Wn.2d at 490

Mr. Prehar knowingly received a benefit in the form of VSS funds. He used it to purchase the property. The trial court believed that he had an obligation to return the money. It is submitted that the record along with the findings of fact that the trial court made support a determination that it would be unjust for the Prehars to retain the benefit that they received without payment. First of all, the funds were to be used to purchase a building where members of the Sikh community were to worship. Secondly, community members believed that the property purchased was going to be titled in the name of VSS. Third, and as the trial court found, the parties intended to negotiate an arrangement where the property was in fact going to be transferred to VSS but never came to an understanding of what those terms would be. (CP 220) Fourth, Mr. Prehar was asked to transfer title to VSS when the nature of the transaction was fully understood. (RP 268) Fifth, 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. (RP 253) Sixth, Mr. Prehar revoked an offer to sell the property to VSS while other community members were still considering it. (CP 219) Seventh, it cannot be disputed that while the Prehars could easily have deeded a proportional

interest in the property to VSS based on the money it contributed to the purchase price, they did not do so. Finally, Mr. Prehar's status as a director of VSS cannot be ignored. The Judgment shows that the trial court found the fourth factor—the revocation of the offer—the most important. It concluded that the conversion occurred at that time. (CP 219)

The facts of this case could require the imposition of a constructive trust on the property to the extent of the VSS funds used for the purchase. That would be a proportional interest of 18.5% if VSS contributed $85,000.00 to the purchase price.[5] A constructive trust can be implied when the legal title to property is placed in one person under such circumstances as to make it inequitable for him to enjoy the beneficial interest. The remedy is designed to avoid unjust enrichment. It is appropriate in the absence of any fraud or wrongdoing by the person in title. *Scymanski v. Default*, 80 Wn.2d 77, 89, 491 P.2d 1050 (1971) It should be ordered in favor of a party who has paid consideration for the purchase of property but has not entered into an agreement setting out the terms of the relationship with the party who took title. This is done to avoid unjust enrichment. *Mehelich v. Mehlich*, 7 Wn.App. 545, 500 P.2d 779 (1972)—constructive trust held warranted in

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[5] A constructive trust is not necessary where, as here, a money judgment has been awarded. *Thor v. McDearmid*, 63 Wn.App. 193, 207, 817 P.2d 1380 (1991)

favor of parent who paid children's house mortgage and made some payments for insurance and taxes; *Yates v. Taylor,* 58 Wn.App. 187, 791 P.2d 924 (1990)—constructive trust allowed in favor of a family member contributed half the costs for construction of a duplex.

Under the authority of *Mehelich v. Mehelich, supra,* and *Yates v. Taylor, supra,* the trial court would have been justified in imposing a constructive trust on the property.[6] The critical aspects of both those cases parallel ours. The party seeking the constructive trust contributed to the acquisition of the property but was not placed in title and there was no agreement between the parties to order their relationship. Also, the person in title bore a close relationship to the other party. Mr. Prehar was a director and officer of VSS. The point here, however, is that a constructive trust is imposed to avoid unjust enrichment, and a constructive trust was found necessary to avoid unjust enrichment in *Mehelich v. Mehelich, supra,* and *Yates v. Taylor, supra.* Since a constructive trust was warranted here to avoid unjust enrichment, there is clearly a duty to return the money to avoid

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[6] Plaintiffs argued for that relief. (CP 192-95) The trial court was thinking along those lines. It stated that the Prehars were the rightfully owners of the property "subject to the conversion of VSS funds." (CP 220) The Judgment became a lien on the property. RCW 4.56.190 It has therefore encumbered the property just as if the trial court had imposed a constructive trust.

unjust enrichment. And, if there is a duty to return the money, conversion is established.

The Prehars argue that there was no conversion because there was no demand for the return of the $85,000.00. But a demand for return of a converted chattel is not necessary to make out a claim for conversion. The demand is useful only as evidence that a conversion has occurred. Other evidence of conversion may be sufficient to establish that a conversion has taken place. *City Loan Company v. State Credit Association*, 5 Wn.App. 560, 562-63, 490 P.2d 118 (1971); See also, *Seaboard Securities Co. v. Berg*, 170 Wash. 681, 690-91, 17 P.2d 646 (1932)—conversion made out in the absence of a demand by the defendant's mortgaging property in violation of an agreement not to do so. In this case, the evidence of a conversion is crystal clear.

The Prehars point out that certain community members did not ask for the return of the money. The money was not their focus. Title in the building was. They understood that the property was supposed to be titled in the name of the community, not in the Prehars' names. (RP 82, 233, 258-59, 276)

In conclusion, the findings that the trial court made were more than sufficient to sustain a judgment based on conversion.

b. Mr. Prehar Is Liable for Breach of His Fiduciary Duty to VSS.

The Prehars are also liable because Mr. Prehar breached his fiduciary duty to VSS by using its funds to purchase property titled in the name of himself and his spouse. This is supported by facts that are undisputed. The trial court determined that there was no breach of fiduciary duty because the use of VSS funds was ratified by the "managing members" of VSS. (CP 220) As will be discussed below, this finding is not sufficient to make out ratification. Since the burden of proof of ratification lies on Mr. Prehar, the trial court's failure to make the necessary findings must be deemed to be a finding that no ratification occurred. The judgment for $85,000.00 must be affirmed on that basis as well.

When he applied funds of VSS to the purchase of the property, Mr. Prehar was a director of VSS. At that time, he was obliged to act "in good faith, in a manner such director believes to be in the best interests of the corporation." RCW 24.03.127 He therefore occupied a fiduciary relationship with reference to VSS. *Diaz v. Washington State Migrant Counsel*, 165 Wn.App., 59, 77, 265 P.3d 956 (2011); *Waltz v. Tanager Estates Homeowners Association*, 183 Wn.App. 85, 91, 332 P.3d 1133 (2016) His duty was analogous to that of a director of a for-profit corporation. As RCW 23.08.300(1) provides, directors of for profit corporations must also act "in good faith" and "in a manner the director

reasonably believes to be in the best interests of the corporation." As such, he was precluded from profiting at the expense of VSS. *Leppaluoto v. Eggleston,* 57 Wn.2d 393, 402, 357 P.2d 725 (1960); *Interlake Porsche + Audi, Inc. v. Blackburn,* 45 Wn.App. 502, 509. 728 P.2d 597 (1986) This fiduciary duty applies even when the corporation is on the brink of dissolving. *Lang v. Hougan,* 136 Wn.App. 708, 718, 150 P.3d 622 (2007) There is little doubt that appropriation of corporate property by a corporate director or officer will support a claim for conversion. It is also viewed as the breach of the director's fiduciary duty. *Lang v. Hougan, supra,* 136 Wn.App. at 718

Mr. Prehar's actions clearly show that he was profiting as an individual at the expense of VSS. He took funds from the VSS bank account and applied them to the purchase of the property in his own name. The Prehars did not transfer title of the property to VSS as community members understood would happen. They did not even deed a proportional undivided interest in the property to VSS in recognition that its funds were used to pay a portion of the purchase price. Finally, the Prehars revoked an offer to sell the property to VSS as the trial court found. The Prehars' actions put them in a position to gain other personal benefits. They could use the property as collateral in connection with other loans that may wish to obtain. They

would reap all the property's appreciation upon its sale. VSS, on the other hand, would receive nothing.

The Prehars may claim that their actions were ratified. Ratification is an affirmative defense upon which the defendant bears the burden of proof. *Alaska Continental Bank v. Anchorage Commercial Land Associates,* 781 P.2d 562, 564 (Alaska 1989); *Cabot Corp. v. AVX Corp,* 448 Mass. 629, 643, 863 N.E.2d 503 (2007); *Brook Valley Limited Partnership v. Mutual of Omaha Bank,* 285 Neb. 152, 169, 825 N.W. 2d 779 (2013) See also, *Giambattista v. National Bank of Commerce,* 21 Wn.App.723, 756, 586 P.2d 1180 (1978)—ratification discussed as an affirmative defense; *Washington Federal Savings and Loan Association v. McNaughton,* 182 Wn.App. 281, 297, 325 P.3d 383 (2014)—the defendant bears the burden of proof on affirmative defenses. The Prehars also had the burden of coming forward with evidence to show the good faith of the transaction since the since the property was transferred into their names only. *Interlake Porsche + Audi, Inc. v. Blackburn, supra,* 45 Wn.App. at 512

The trial court very carefully concluded that "the managing members of VSS approved of the use and anticipated the use of the funds for

the purchase of the real property" in the names of the Prehars.[7] (CP 220) If this is a finding of fact, it is not sufficient to support ratification. When corporate assets are appropriated to a corporate fiduciary, all shareholders must consent. *Fletcher Cyclopedia of Corporations,* § 1104, cited with favor in *Nursing Home Building Corp. v. Dehart,* 13 Wn.App. 489, 496-97, 535 P.2d 137 (1975) Members of a nonprofit corporation are analogous to the shareholders of a for profit corporation. Therefore, the Prehars would have to prove that all the members of VSS—not merely those in management—gave consent to VSS funds being used to allow the Prehars to obtain title to the property in their own name. They would also have to show that the members gave this consent after being apprised of all material facts, including their legal effect.[8] As the Court stated in *Kane v. Klos,* 50 Wn.2d 778, 785, 314 P.2d 672 (1947):

> For a cestui que trust to "ratify" or confirm a breach of trust, he must be apprised of all the material facts and as well of their legal effect. No half-hearted disclosure or partial discovery is sufficient in either respect. The trustee's duty of disclosure is not discharged by leaving the cestui to draw doubtful inferences, conclusions and suspicions.

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[7] Plaintiffs are assigning error to this statement assuming that it is a finding of fact.

[8] The Court *In re Kitsap Dairyman's Association,* 6 Wn.App. 926, 940, 497 P.2d 604 (1972), cited *Kane v. Klos, supra,* on the issue of ratification in a case involving a nonprofit corporation. That means that there should be no difference between the ratification rules governing for-profit and nonprofit corporations.

Under the exacting requirements set out in *Kane v. Klos, supra,* any disclosure to members would have had to include a number of items to support the position that the Prehars have taken in this suit. First of all, the disclosure would have to include all the terms of the sale and the source of all monies and obligations being used to close the transaction. The members would have to be advised that VSS was contributing a total of $90,000.00 to the sale price—the $5,000.00 for earnest money as well as the $85,000.00. Secondly, all legal effects would have had to be clearly explained. Specifically, the disclosure would have to note that the Prehars would be taking sole title to the property and that VSS would have no interest in the property; that the Prehars would have no obligation to reimburse VSS for the funds taken from its account to pay the purchase price; that the Prehars would not have to convey any interest in the property to VSS—not even a proportional share as discussed above; that the Prehars did not have to sell the property to VSS or any combination of its members; that any agreement to sell or convey the property would have to be in writing to satisfy the statute of frauds and, if the agreement provided for payment to the Prehars over time, the rigorous specifications for such an agreement contained in *Hubbell v. Ward,* 40 Wn.2d 779, 246 P.2d 468 (1952), and, perhaps most

importantly, the Prehars could exclude anyone from the property that they desired.[9]

The trial court made no findings of fact concerning exactly what was disclosed. (CP 220) There is nothing in the record that any of the Members, including those who had donated money, were ever told that in the absence of a written agreement sufficient to comply with the statute of frauds and the requirements of *Hubbell v. Ward, supra*, that the Prehars would be under no obligation to transfer the property to VSS after the transaction was closed. Whatever knowledge that members had can only amount to the "half hearted disclosure or partial discovery" held to be insufficient in *Kane v. Klos, supra.*

The trial court also did not find that all VSS members consented. It could make no such finding. Several members indicated their belief that the property was going to be purchased in the name of VSS. A number of members made donations.[10] Some requested and were given refunds of what they paid.[11] There is no indication that those who received a refund

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[9] While the trial court found that the parties intended to negotiate a transfer of the property, it rejected the quiet title claim made by Plaintiffs on the basis that the parties never reached an agreement. (CP 220)

[10] These were the Prehars, Mr. Nagra, Mr. Minhas, Gurmel Singh, Mr. Dothier of HD Trucking, Ranbir and Manjit Singh, Harinder Panglia, Paramvir Singh, and Hardev Atwal. (Ex. 45-46; RP 62-70)

[11] The Prehars were refunded $15,000.00 of what they contributed. Refunds were also made to Mr. Dothier, Mr. Panglia, and Mr. Minhas. (Ex. 45; RP 68-70)

thereby resigned as members. There is no evidence that any of them—other than the Prehars, of course—ratified the action. There is also no evidence that each of the persons who did not receive a refund ratified the transaction. There is absolutely nothing in the record concerning any supposed ratification—or for that matter knowledge at the time—on the part of Ranbir and Majit Singh and Hardev Atwal.

Since the Prehars bear the burden of proof on ratification, the trial court's failure to make sufficient findings on this issue must be deemed to be a finding against them. *Golberg v. Sanglier*, 96 Wn.2d 874, 880, 639 P.2d 1347 (1982); *Xieng v. People's National Bank*, 120 Wn.2d 512, 526, 844 P.2d 389 (1993) Therefore, there can be no ratification. Without this ratification, Mr. Prehar's taking of VSS funds to pay for property titled in his name amounts to a breach of his fiduciary duty as a director.

In conclusion, Mr. Prehar clearly violated his fiduciary duty as a director by taking VSS funds and applying them to the purchase of the property. The judgment against the Prehars can be sustained on that ground as well.

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c. The Prehars Are Liable under the Doctrine of Money Had and Received.

A party who is not guilty of conversion can still be liable under the equitable doctrine of money had and received. The trial court's judgment for $85,000.00 can be affirmed on that ground as well.

A party may be liable for money obtained under the doctrine of money had and received. This is a common law action devised by judges to give relief to meritorious claims where the elements of conversion may not have been satisfied. It is based on notions of restitution and is founded on the principle that no one ought unjustly to enrich himself at the expense of another. The gist of the action is that the defendant has received money which in equity and good conscience should have been paid to the plaintiff, and under such circumstances that he ought, by the ties of natural justice, to pay it over. *Seekamp v. Small, supra*—where a claim for conversion of money was not supported by the record, the Court affirmed on the basis that liability under the doctrine of money had and received was supported.

The facts of this case and the trial court's findings of fact clearly support a judgment on the basis of money had and received. The Prehars took $85,000.00 from a bank account of VSS and applied it to property purchased in their name alone. These funds made up approximately 18.5% of the purchase price. But the Prehars have never deeded an 18.5%

ownership share to VSS and refused to recognize this source of funds when pressed by other community members. The trial court clearly believed that considerations of equity and good conscience required the Prehars to pay the money over to VSS. To have done otherwise would have unjustly enriched them at VSS' expense as discussed in detail above.

The trial court awarded judgment in favor of VSS and against the Prehars for $85,000.00. The record as well as the findings of fact that the trial court made justify the trial court's conclusion under the doctrine of money had and received.

d. Conclusion.

The trial court concluded that the Prehars converted $85,000.00 of funds from VSS. Its decision was correct. If the Court determines that it was not, however, the decision should still be affirmed as a breach of Mr. Prehar's duty as a director of VSS and under the doctrine of money had and received.

III. The Trial Court's Rejection of the Affirmative Defense of Equitable Estoppel Must Be Affirmed

The trial court concluded that the Prehars had not met their burden of proving equitable estoppel by clear, cogent, and convincing evidence. Reversal cannot be based on the trial court's finding that a party failed to meet a burden of proof. In any event, the evidence warranted this decision.

The elements of equitable estoppel are: (1) a party's admission, statement or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. *Robinson v. Seattle,* 119 Wn.2d 34, 82, 830 P.2d 318 (1992) In addition to satisfying these elements, the party asserting the doctrine must be free from fault in the transaction at issue. A party may not base a claim of estoppel on conduct, omissions, or representations induced by his or her own conduct, concealment, or representations. This principle is known as the clean hands doctrine. *Mutual of Enumclaw v. Cox,* 110 Wn.2d 643, 651, 757 P.2d 499 (1988); *Norcon Builders, LLC v. VMP Homes SP, LLC,* 161 Wn.App. 474, 484, 254 P.3d 835 (2011)

Since equitable estoppel is not a favored doctrine, a party asserting equitable estoppel must prove each element of estoppel with clear, cogent and convincing evidence. This burden of proof contains two elements: first, the amount of evidence that is a prerequisite to submitting the question to the trier of fact; and second, the persuasive impact which the law requires of that evidence. This is a higher burden of persuasion than the preponderance of evidence standard applicable to most civil cases. Under the preponderance of evidence standard, the trier of fact must believe that it

is more probable than not that the fact in issue is true. Under the enhanced clear, cogent, and convincing standard, the trier of fact must be convinced that the fact in issue is "highly probable." That means that "the facts relied upon to establish an equitable estoppel must be clear, positive, and unequivocal in their implication . . . .". *Colonial Imports, Inc., v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 734-35, 853 P.2d 913 (1993)

The trial court concluded that the Prehars had not met their burden of proving estoppel by clear, cogent, and convincing evidence. (CP 221) The Prehars argue that the trial court's conclusion that the "managing members" or the "negotiating parties" had agreed that VSS funds could be used in the purchase compels a finding of estoppel. (CP 219-20) That argument must be rejected. These statements made by the trial court were made in the context of discussing the conversion claim where there is no enhanced burden of proof. The evidence adduced in support of a fact can be sufficient to prove that fact by a preponderance but not sufficient to establish the fact by clear, cogent, and convincing evidence. The Prehars argument is tantamount to asking the Court to weigh the evidence differently than did the trial court. But appellate courts do not hear or weigh evidence, find facts, or substitute their opinions on such matters for those of the trier-of-fact. *Chevalier v. Woempner*, 172 Wn.App. 467, 474, 290 P.3d 1031 (2012) The

trial court's decision—the the Prehars did not meet their burden of proof on estoppels—must therefore stand.

The trial court's decision was correct in any event. First of all, since the Prehars are attempting to escape any liability of any kind, the representation necessary to support estoppel would have to be far more than permission to use the funds to purchase the property. In order to be inconsistent with the claim now being made, the representation would have to include an indication that the the Prehars could take title to the property in their own names; that they would never have to convey any interest in the property to VSS in the absence of an agreement executed by all parties and satisfying the statute of frauds and perhaps that complying with the requirements of *Hubbell v. Ward, supra*; and that they would never have to account for or reimburse VSS for the funds taken. The trial court did not find that such a representation was ever made.

Secondly, equitable estoppel requires proof of an injury should the statement be repudiated. The trial court made no finding of any injury. The absence of a finding amounts to a finding against the party with the burden of proof. *Golberg v. Sanglier, supra; Xieng v. People's National Bank, supra.* Therefore, the absence of a finding detailing injury amounts to a finding that no injury occurred since the Prehars bear the burden of proof on their equitable estoppel claim.

The Prehars claim that injury stems from not requiring any rent from GSV and from the donations made to GSV. First of all, GSV is not VSS. Whatever may have been done for GSV has no relevance here. Secondly, the Prehars received a benefit from any donations that they made in the form of the federal income tax deductions that they claimed. (Ex. 76) Their doing so was not lost on the trial court. (CP 219) In any event, it is hard to see how the Prehars were injured when they acquired valuable real property which they can sell to recoup whatever they are required to pay to VSS or use in other ways.

The Prehars' estoppel claim must also fail because of Mr. Prehar's own conduct and his lack of "clean hands." His applying funds to the purchase of the property in the name of himself and his spouse breached his fiduciary duty to VSS as discussed above. There were discussions, as the trial court found, of titling the property in the name of VSS. This was consistent with the understanding of other community members who always believed that VSS would be the owner of the property. But when pressed, Mr. Prehar revoked his offer to do so.

Finally, and as the trial court noted, there were "multiple agreements and relationships result in fault created by both parties." (CP 221)

At the end of the day, the trial court found that the Prehars had not met their burden of proof on this affirmative defense. No findings of fact

were made to support it. Therefore, the trial court's decision on this point must be affirmed.

IV. There Was No Forfeiture.

The Prehars claim that the judgment worked a forfeiture because they contributed $30,000.00 to VSS. This argument has no merit.

The making of the gift divests the donor of all control and passes immediate title to the donee. *Estate of Pappuleas,* 5 Wn.App. 826, 829, 490 P.2d 1340 (1971); *Marriage of Martin,* 32 Wn.App. 92, 96, 645 P.2d 1148 (1982) Therefore, any donations made to VSS immediately became the property of VSS. They could not be "forfeited" because the Prehars had no further interest in the money that they donated.

The Prehars also have no legitimate concern about what will happen to the money when the judgment is paid. The directors of VSS will determine how the money is used.

The trial court rejected this argument that the Prehars made. (CP 219-20) Its ruling was correct.

V. The Prehars' Arguments on Interest Must Be Rejected.

The trial court awarded prejudgment interest at the rate of 12% per annum on the basis that the $85,000.00 amount was liquidated and commenced prejudgment interest on August 28, 2014. (CP 219) The Prehars take no issue with that ruling. They contend, however, that that the

mathematical calculation was incorrect. They also argue that post judgment interest should have been awarded at the rate allowed by RCW 4.56.110(3) instead of the rate of 12% per annum allowed by RCW 4.56.110(4) and RCW 19.52.020. These arguments cannot carry the day.

First of all, the Prehars did not raise this issue with the trial court. They never discussed it in their trial brief. (CP 166-78) They did not address this issue in their closing argument at trial. (CP 742-65) They also did not bring it up in a motion for reconsideration.[12] Therefore, the matter cannot be considered now. As RAP 2.5(a) states, "The appellate court may refuse to review any claim of error which was not raised in the trial court."

The failure to raise in the trial court what appears to be an arithmetical error on the computation of prejudgment interest is particularly concerning. Since the trial court made its own calculation, it should have had the opportunity to place its method of calculation on the record for review.[13]

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[12] A motion for reconsideration is sufficient to preserve a claim of error. *Dixon v. Crawford, McGilliard, Peterson, & Yelish,* 163 Wn.App. 912, 921 fn. 20, 262 P.3d 108 (2011) Conversely, when a party failed to make a motion for reconsideration that alleged different grounds to support a position she took at trial, the Court refused to consider those different grounds. *Kellar v. Estate of Kellar,* 172 Wn.App. 562, 579, 291 P.3d 906 (2012)

[13] Arithmetical errors can also be corrected in a motion based on CR 60(a). Tegland *Civil Procedure* §39:4

The Prehars' argument on post judgment interest is based on RCW 4.56.110 which provides as follows in pertinent part[14]:

> Interest on judgments shall accrue as follows:
>
> (3)(b) . . .(J)udgments founded on the tortious conduct of individuals or other entities, whether acting in their personal or representative capacities, shall bear interest from the date of entry at two percentage points above the prime rate, as published by the board of governors of the federal reserve system on the first business day of the calendar month immediately preceding the date of entry. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.
>
> (4) Except as provided under subsections (1), (2), and (3), of this section, judgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020. . . on the date of entry thereof. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

The applicable rate is based on the primary foundation of the claim. If the primary foundation is based on tort, then the rate set out in RCW 4.56.110(3) applies. If the primary foundation is something else, then the

[14] RCW 4.56.110 was amended to be effective July 1, 2018. The amendment concerns student loans and is not applicable to our case. The pertinent parts of the statute as it existed when judgment was entered are set out in the body of the brief.

rate allowed by RCW 19.52.020 applies. *Miller v. Kenny,* 180 Wn.App. 772, 818-820, 325 P.3d 278 (2013)

The Prehars contend that rate set out in RW 4.56.110(3) should apply because conversion is generally considered to be a tort. However, the statute does not define the term "tortious." And that term has been held not to include claims founded on notions of unjust enrichment. In *Stevens v. Brink's Home Security, Inc.,* 162 Wn.2d 42, 51-52, 169 P.3d 473 (2007), the Court held that an employees' claims under the Minimum Wage Act were not tortious for the purposes of RCW 4.56.110(3) because they amounted to claims for unjust enrichment—the employer's receiving the employees' work without paying for it.

While the claims made on behalf of VSS were styled as claims for conversion, they sound more as claims for unjust enrichment. As discussed above, the obligation to return the money is based on unjust enrichment. If the Court chooses to credit the Prehar's argument that they are not guilty of conversion, they are still are liable under the doctrine of money had and received as discussed above. And as the Court stated in *Seekamp v. Small, supra,* 39 Wn.2d at 584, it is a remedy which is neither tort nor contract. That renders them liable for interest at the rate set out in RCW 19.52.020 as RCW 4.56.110(4) states.

A 12% per annum rate of interest is justified by RCW 19.52.020. That statute states as is applicable here:

> (1) Any rate of interest shall be legal so long as the rate of interest does not exceed the higher of: (a) Twelve percent per annum; or (b) four percentage points above the equivalent coupon issue yield (as published by the Board of Governors of the Federal Reserve System) of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the later of (i) the establishment of the interest rate by written agreement of the parties to the contract, or (ii) any adjustment in the interest rate in the case of a written agreement permitting an adjustment in the interest rate. No person shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater interest for the loan or forbearance of any money, goods, or things in action.

In conclusion, the Prehars' arguments in this area should not be considered because they were not brought to the trial court's attention. Nonetheless, the trial court's determination of the interest rate was correct since VSS's claim was based on unjust enrichment.

VI. Conclusion.

The points made by the Prehars are not well taken and should be rejected by the Court for the reasons stated above.

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ARGUMENT ON CROSS APPEAL

I. The Trial Court Erred if It Found That "The Managing Members of VSS Approved of the Use and Anticipated the Use of the Funds for the Purchase of Real Property in Defendant's Name."

In the judgment, at CP 220, the trial court stated the following:

> At 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.

(CP 220) If this statement amounts to a finding of fact, it was error because it was not supported by substantial evidence.

Substantial evidence is that quantity of evidence sufficient to persuade a rational, fair-minded person that a finding is true. *Casterline v. Roberts, supra.* That quantum of evidence is simply not present here.

The trial court made no findings of fact as to who VSS' managing members may have been in the spring of 2013 when the property was being purchased. There is no evidence to show that the members of VSS had ever appointed any management committee. No document to that effect was submitted. There was no testimony concerning any management committee.

It may be that the trial court was referring to VSS' directors since a nonprofit corporation is managed by its board of directors.[15] As RCW 24.03.095 states:

> The affairs of a corporation shall be managed by a board of directors. Directors need not be residents of this state or members of the corporation unless the articles of incorporation or the bylaws so require. The articles of incorporation or the bylaws may prescribe other qualifications for directors.

VSS' directors were Mr. Prehar and his nephew, Harpreet Minhas. (RP 521) If that was the trial court's intention, it would exclude Mr. Nagra who was only the treasurer of VSS but apparently not a director.

Presumably, the trial court was referring to approval by someone other than Mr. Prehar. There is no record of any meeting of the board of directors at which this issue was discussed and approval was given. There is no document signed by the directors indicating their approval of the transaction. Counsel has also been unable to locate anything in the trial transcript about any meeting of the board of directors. Counsel has also been unable to find anything in the transcript to the effect that Mr. Minhas was even consulted about applying VSS monies to a purchase of property

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[15] The statement would then amount to a conclusion of law since it requires legal reasoning.

in Mr. Prehar's name. In short, there is simply nothing in the record to support approval by the Board of Directors.

The trial court may have been referring to the parties who were initially named as purchasers on the PSA. These were Messrs. Prehar, Kullar, and Nagra. But there is no evidence that Mr. Kullar had any role in management of VSS. Mr. Nagra was VSS' treasurer for a time. He understood that VSS money was going to the purchase but he believed that the property would ultimately be titled in the name of VSS.

In short, there is no evidence—much less any substantial evidence—to support the statement that the trial court made. The trial court erred in making it. It cannot be used to support any claim that the Prehars are making.

II. The Trial Court Erred by Not Including $5,000.00 for Earnest Money in the Amount of the Judgment.

Upon the execution of the contract for the purchase of the property in April of 2013, Mr. Prehar paid the required $5,000.00 of earnest money from the VSS bank account at Wells Fargo. This was acknowledged by counsel for the Prehars and is undisputed. (RP 432-33; RP 520) The trial court did not, however, mention this amount in the Judgment. It should

also have been awarded for the same reasons that judgment was given for the other $85,000.00. Failure to award this additional sum was error.

The failure of the trial court to mention the earnest money in its findings of fact is not fatal to this claim. As pointed out above, the absence of any finding of fact on an issue is presumed to be a finding against the party that has the burden of proof. This rule does not apply, however, when the evidence is undisputed. This rule is sensible because strict application of the rule would be unjust when, as here, the evidence is uncontradicted. *Lian v. Stalick*, 106 Wn.App. 811, 832, 25 P.3d 467 (2001)

The Prehars also cannot argue that no claim for the earnest money was made. During closing, counsel stated that the Prehars had received the benefit of $90,000.00. (RP 733, 736)

The $5,000.00 of earnest money was applied to the purchase of the property in the same way as was the $85,000.00. Both came from the VSS' account at Wells Fargo. Both were to be applied for the purchase of property in VSS' name as Mr. Nagra testified. Both are set out on the settlement statement for the closing of the sale. Both sums were retained by the Prehars when they failed to convey any part of the property to VSS. The Prehars are liable for the earnest money in the same way that they are

liable for the $85,000.00 as discussed on pps. 8-24. There is no principled reason for the trial court to have awarded judgment for the $85,000.00 without also awarding the $5,000.00 for the earnest money.

On the basis of this issue, the Court should reverse the judgment with directions to add $5,000.00 to the amount awarded as damages as well as appropriate prejudgment interest.

III. The Trial Court Erred in Its Assessment of Prejudgment Interest.

The trial court assessed prejudgment interest from August 28, 2014. This was an abuse of the trial court's discretion and therefore error. The loss and its amount were liquidated no later than June 28, 2013. Prejudgment interest should have been assessed as of that time.

It is conceded at the outset that the Plaintiffs made no argument concerning prejudgment interest before the trial court. Neither did the Prehars as discussed above. If the Court decides to consider the Prehars' contentions concerning prejudgment interest, it is submitted that it should also consider the arguments made here on behalf of VSS.

An appellate court reviews a trial court's order on prejudgment interest for abuse of discretion. Under this standard, the ruling can be reversed only if it is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. Untenable reasons include

errors of law. *Humphrey Industries Limited v. Clay Street Associates,* 176 Wn.2d 662, 672, 295 P.3d 231 (2012)

The discussion must begin with some general considerations. Prejudgment interest is awarded to compensate a plaintiff for the use value of the money representing liquidated or determinable damages. *Hansen v. Rothaus,* 107 Wn.2d 468, 474-75, 730 P.2d 662 (1986) It is utilized to prevent unjust enrichment. *Polygon Northwest Company v. American National Fire Insurance Company,* 143 Wn.App. 753, 793, 189 P.3d 777 (2008)

Prejudgment interest is awarded on liquidated conversion claims from the date of the conversion. *Grays Harbor County v. Bay City Lumber,* 47 Wn.2d 879, 891, 289 P.2d 975 (1955) Prejudgment interest is also available for claims for money had and received. *Mall Tool v. Far West Equipment Co.,* 45 Wn.2d 158, 170, 273 P.2d 652 (1954) Generally speaking, prejudgment interest is available from the date when the claim becomes liquidated. *Green v. Rocket Research Corp.,* 12 Wn.App. 613, 620 530 P.2d 1340 (1975)

Mr. Prehar took the $85,000.00 from the VSS account on May 2, 2013. The transaction closed on June 28, 2013. VSS' claim was liquidated by no later than the closing date of June 28, 2013. That is the

time that the Prehars converted the funds and/or were unjustly enriched because that is the day that the money was irrevocably committed to the purchase of property in their names. It would also be reasonable to conclude that the $85,000.00 was converted on May 2, 2013, the date that Mr. Prehar took it from the VSS bank account.

The trial court opted to award interest from the time that Mr. Prehar revoked the offer to have the property purchased by the community. That decision was an abuse of discretion because it was based on untenable reasons. As discussed above, the conversion and taking of the money was complete—at the latest—when the transaction was closed in June of 2013. The purpose of awarding prejudgment interest is allowing the aggrieved party to recover the use value of the money taken. The money was taken no later than when the transaction closed. The decision is at odds with these facts. The decision also conflicts with the rule that liquidated damages begin when the claim is liquidated. This claim was liquidated no later than the date of closing when the money was applied to the purchase of the property.

The trial court abused its discretion by beginning prejudgment interest in August of 2014. It should be assessed as of the date of closing.

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CONCLUSION

The trial court should be affirmed insofar as it ruled that the Prehars are liable to VSS for damages. It should be reversed, however, with directions to award damages in the amount of $90,000.00 and prejudgment interest from June 28, 2013.

DATED this 15 day of May, 2018.

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