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Division II
State of Washington
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COURT OF APPEALS NO. 50915-6-II

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

Ted Spice,
Appellant,
vs.

ESTATE OF DORIS MATHEWS, DONNA DUBOIS as
personal representative of the Estate, MARK DUBOIS, a purported agent
of the Estate, DORIS ELAINE MATHEWS LIVING TRUST,
Respondents

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

a. Disputed procedural history

The Estate notes that this Court reversed the summary judgment decision based upon waste in No. 48458-7-II. Then the Estate claim that it “is not precluded from seeking dismissal of the claim for waste, which dismissal was granted.” Br. Resp. 14. It cites to CP 1582-83, the November 2, 2017 decision, for the proposition that the Estate was seeking to dismiss the remanded waste issues and that the trial court dismissed the claim.

The trial court did not address the remanded issues. This Court reversed on the issue of waste on December 12, 2017. See *Spice v. Estate of Doris Mathews* (WA. Ct. App. Div. 2 Unpublished No. 48458-7-II). The November 2, 2017 decision (CP 1582-83) followed oral arguments on the October 27, 2017 where the Court addressed “the estate’s motion to dismiss.” October 27, 2017 RP 5:20-25.

b. Agreed issues

Respondent does not provide a statement of issues in Respondent’s response. RAP 10.3 requires a statement of issues unless “respondent is satisfied with the statement in the brief of appellant or petitioner.” The parties appear to agree that the issue statement provided in *App. Br.* at 3-5 are accurate.

The Estate did not address all the issues set forth in Appellant's opening brief. Specifically, issue eight pertaining to a superior court judge *sua sponte* overruling another superior court judge is not challenged.

c. Bankruptcy discharge of the personal representative does not prevent litigation against the Estate

The Estate relies upon RCW 11.04.250 to argue that title of real property at issue in this matter vested immediately in Donna Dubois, Donna Dubois filed for bankruptcy protection, and therefore any claims against the Estate are barred.

RCW 11.04.250 provides:

When a person dies seized of lands, tenements or hereditaments, or any right thereto or entitled to any interest therein ... his or her title shall vest immediately in his or her heirs or devisees, subject to his or her debts, family allowance, expenses of administration, and any other charges for which such real estate is liable under existing laws. No administration of the estate of such decedent, and no decree of distribution or other finding or order of any court shall be necessary in any case to vest such title in the heirs or devisees, but the same shall vest in the heirs or devisees instantly upon the death of such decedent: PROVIDED, That no person shall be deemed a devisee until the will has been probated. The title and right to possession of such lands, tenements, or hereditaments so vested in such heirs or devisees, together with the rents, issues, and profits thereof, shall be good and valid against all persons claiming adversely to the claims of any such heirs, or devisees, excepting only the personal representative when appointed, and persons lawfully claiming under such personal representative; and any one or more of such heirs or devisees, or their grantees, jointly or severally, may sue for and recover their respective shares or interests in any such lands, tenements, or hereditaments and the rents, issues, and profits thereof, whether

letters testamentary or of administration be granted or not, from any person except the personal representative and those lawfully claiming under such personal representative.

This Court has recognized that "the term 'subject to' in RCW 11.04.250 means that the value of a bequest can be reduced to pay estate obligations." *In re Estate of Westall*, 423 P.3d 930, 936 (Wash. Ct. App. Div. 2 2018). "Until an estate is closed, the heirs may not treat estate real property as their own." *In re Estate of Jones*, 152 Wn.2d 1, 14, 93 P.3d 147 (2004). Until the Estate is closed Mrs. DuBois has only the rights as an executor of the Estate. See *id.* She should not have had the real properties transferred to her bankrupt estate.

The Estate has previously argued that the title to the properties is not vested in Donna DuBois and requested that the properties be "transfer[ed] ... directly to Donna DuBois." CP 561. This was done in the context of the argument that "all creditor claims have been dismissed" and that efficient administration of the properties could be better handled in the bankruptcy court. *Id.* The trial court agreed and transferred the properties of the Estate to Donna DuBois on March 31, 2017, but kept the proceeds of any sale as the property of the Estate. CP 707-09. Following the transfer the Estate began to argue, as it does on appeal, that the Court

gave up its subject matter jurisdiction by transferring the properties. CP 1261.

The Estate also claims that a bankruptcy discharge occurred under 11 USC Section 727 that operates as a complete bar to claims against the Estate. The Estate conflates itself with its heir and personal representative. This is a comingling that has caused repeated disputes. There is no evidence that the Estate of Doris Matthews has ever petitioned for bankruptcy protection.

The Estate points to a discharge of two debtors, Mark and Donna DuBois. CP 1382. Mark and Donna DuBois are not personally sought to be held liable for any allegation of matters occurring prior to their petition for bankruptcy protection. The discharge order describes Mrs. DuBois as “Donna E DuBois aka Estate of Doris Mathews fka Donna Mathews.” CP 1382. The “Estate of Doris Mathews” is not the debtor in that discharge. The Debtor is solely Mrs. DuBois. To the extent Ms. DuBois may be (incorrectly) referred to as “the Estate of Doris Mathews” by a creditor then the pre-filing debts would presumably be discharged. Spice, however, does not seek personal liability against Mrs. DuBois.

d. **Res judicata and collateral estoppel do not operate as a bar to the claims herein**

The Estate cites to *Pederson v. Potter*, 103 Wn. App. 62, 67 (2000) as a guide to four elements of the doctrine of res judicata: “[a]pplication of the doctrine requires identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of persons for or against whom the claim is made.” *Id.* However, the fifth element, as noted in *Pederson*¹ is that “[r]es judicata also requires a final judgment on the merits.”

A final judgment, for purposes of res judicata means:

In order that a judgment or decree should be on the merits, it is not necessary that the litigation should be determined on the merits, in the moral or abstract sense of these words. It is sufficient that the status of the action was such that the parties might have had their suit thus disposed of, if they had properly presented and managed their respective cases.

Id. at 70 (adopting *CenTrust Mortgage Corp. v. Smith & Jenkins*, P.C., 220 Ga.App. 394, 397, 469 S.E.2d 466, 469 (1996)).

This appeal involves to the most recently filed amended complaint of June 13, 2017 for fraud, fraudulent transfer, agent acting without authority, failure to provide litigation and development fees and costs based on litigation of an easement benefitting the property, and continuing

¹ Interestingly, the only novel question in *Pederson* concerned the meaning of the “final judgment on the merits” element. 103 Wn. App. at 68 (“no case deals precisely with whether a confession of judgment is a final judgment for the purposes of res judicata.”).

waste based on failure to repair, remodel, or otherwise rehabilitate the properties so that the properties could be rented.²

The action the Estate predicates its res judicata defense upon is the matter that has been remanded to the superior court by this Court for purposes of waste by a party in a quasi-fiduciary relationship and presumably any continuing waste. The claim for continuing waste will ultimately need to be consolidated if remanded into the litigation currently pending in superior court that this Court had previously remanded in No. 48458-7-II. There has not been a final judgment, and res judicata is inapplicable to the claim of waste.

Spice's allegations regarding unpaid rent in this new lawsuit alleges different unpaid rent than had been previously complained of. See CP 978-79 ("according to a professional accounting the lost rent to me was \$49,000 in January 2016. The new creditor claims seek subsequent losses in excess of \$15,000.").

e. Laches is not a defense to claims against the Estate as the Estate suffers no damage from having to resolve creditor claims

² The proposed Amended Complaint was the filed Amended Complaint. CP 352.

As the Estate points out, a required element of the defense of laches is that the party asserting the defense must suffer damage “resulting from ... unreasonable delay.” Resp. Br. 15 (citing *Lopp v. Peninsula School Dist. No. 401*, 90 Wn.2d 754, 759 (1978)). “Laches is an implied waiver arising from knowledge of existing conditions and acquiescence in them.” 90 Wn.2d at 759.

The Estate’s only allegation of damage is that there has been a history of litigation and that witnesses may have been lost or memories faded. Resp. Br. 15.

The Estate is presently engaged in litigation with Spice relating to its mismanagement of co-owned real properties resulting in waste to the properties. There is no harm in the claims being presented in litigation that can be consolidated with the existing litigation. The claims involve similar circumstances and presumably many of the same witnesses.

f. Title transfer claims

The Estate claims that the “claims related to property transfers were then dismissed on Summary Judgment on October 30, 2015, and not appealed in prior appeal.. CP 1826-1828, 1868-1922; Appellant’s Opening Brief, Appendix A.” Resp. Br. 13.

CP 1826-1828 does not reference a decision regarding the improper title transfers. CP 1868-1922 (a 54 page cite) referenced by the

Estate is an appellate brief that doesn't address what the Estate claims was not appealed. Resp. Br. 13. The Estate is correct that no decision regarding the title transfer from Mrs. DuBois, as personal representative, to herself was appealed. The Estate is, however, incorrect that there was ever any decision concerning these title transfers. See CP 1826-28 (order on summary judgment that was the subject of the relevant appeal); see also Appx. A, Report of Proceedings October 16, 2015 39-41:13 ("I don't think there's anything for me to rule on that, so I'm not going to. I'm going to grant the summary judgment on the issues I just ruled on, if you can prepare an order.")

g. Hon. Kirkendoll should have recused herself and vacated her prior decision.

Hon. Kirkedoll has a court staff member whose brother in law is involved in ongoing litigation with Spice and was awaiting a decision from Hon. Kirkendoll to give approval to sell real property that the Estate co-owns with Spice to the staff member's brother in law. This creates an appearance of unfairness. Hon. Kirkendoll should have vacated her order approving the real property sale after the conflict was discovered.

State ex rel. Barnard v. Board of Education, 19 Wash. 8, 17-18, 52 P. 317, 320 (1898), eloquently described the importance of the appearance of fairness:

The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts; in fact, the administration of justice through the mediation of courts is based upon this principle. It is a fundamental idea, running through and pervading the whole system of judicature, and it is the popular acknowledgment of the inviolability of this principle which gives credit, or even toleration, to decrees of judicial tribunals. Actions of courts which disregard this safeguard to litigants would more appropriately be termed the administration of injustice, and their proceedings would be as shocking to our private sense of justice as they would be injurious to the public interest.

The appearance of fairness doctrine is based on the fundamental notion in our system of justice that judges must be “fair and unbiased.” *GMAC v. Everett Chevrolet, Inc.*, 179 Wn.App. 126, 153, 317 P.3d 1074 (2014) *review denied*, 181 Wn.2d 1008 (2014).

Judges must not only be impartial, but they must also demonstrate the appearance of impartiality. *Id.* at 154. “Even ‘a mere suspicion of irregularity, or an appearance of bias or prejudice’ should be avoided by the judiciary.” *Id.* (quoting *Chi., Milwaukee, St. Paul & Pac. R.R. v. Wash. State Human Rights Comm’n*, 87 Wn.2d 802, 557 P.2d 307 (1976)). The law requires more than an impartial judge it “requires that the judge appear to be impartial.” *State v. Madry*, 8 Wn.App. 61, 70, 504 P.2d 1156 (1972).

Whether a proceeding satisfies the appearance of fairness doctrine is judged by how it appears to a reasonably prudent person. *Id.* Caselaw is

somewhat mixed on whether proof requires “actual or perceived bias” or that proof requires “actual or potential bias.”

Some cases indicate that there must be proof by the litigant of “actual or perceived bias” to support an appearance of impartiality claim. *GMAC v. Everett Chevrolet, Inc.*, 179 Wn.App. at 153 (citing *Magana v. Hyundai Motor Am.*, 141 Wn.App. 495, 523, 170 P.3d 1165 (2007), rev'd on other grounds, 167 Wn.2d 570, 220 P.3d 191 (2009)); see also *H.B.H. v. State*, 197 Wn.App. 77, 95, 387 P.3d 1093 (2016); *In re Marriage of Rounds*, 423 P.3d 895 (2018) (“actual or perceived bias” must be shown) (citing *Santos v. Dean*, 96 Wn.App. 849, 857, 982 P.2d 632 (1999) (which cites to *State v. Post*, 118 Wash.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992) for requirement of “actual or potential bias”), review denied, 139 Wn.2d 1026, 994 P.2d 845 (2000)).

Other cases hold slightly differently. The Estate cites³ to *Tatahm v. Rogers*, 170 Wn. App. 76, 96, 283 P.3d 583 (2012) for the requirement that a litigant must “present sufficient evidence demonstrating actual or

³ The Estate also cites to *In re Pers. Restraint of Haynes* 100 Wn.App. 366, 377, 996 P.2d 637 (2000) (a minor typographical error cites to 100 Wn.App. at 388) for the proposition, as quoted from Resp. Br. at 17 “The party must produce sufficient evidence demonstrating actual or potential bias, such as personal or pecuniary interest on the part of the judge; mere speculation is not enough.” However, *In re Haynes* at 377 n. 23 only states “A party asserting a violation of the doctrine must produce sufficient evidence demonstrating bias, such as personal or pecuniary interest on the part of the decision maker; mere speculation is not enough.”

potential bias.” *Tatahm* cites to *State v. Post*, 118 Wash.2d 596, 619 n. 9⁴ 9826 P.2d 172, 837 P.2d 599 (1992), which held:

Past decisions of this court have applied the appearance of fairness doctrine when decision-making procedures have created an appearance of unfairness. E.g., Smith v. Skagit Cy., 75 Wash.2d 715, 453 P.2d 832 (1969). Our decision here does not overrule this line of decisions, but reformulates the threshold that must be met Before the doctrine will be applied: evidence of a judge's or decisionmaker's actual or potential bias. This enhanced threshold requirement is more closely related to the evil which the doctrine is designed to prevent.”

Post appears aimed at “decision-making procedures” and that the prior precedent is expressly not overruled. *Id.* The original “evil” which the doctrine is designed to prevent encompasses the perception of bias. See *State ex rel. Barnard v. Board of Education*, 19 Wash. 8, 17--18, 52 P. 317, 320 (1898), *Chi., Milwaukee, St. Paul & Pac. R.R. v. Wash. State Human Rights Comm'n*, 87 Wn.2d 802, 809, 557 P.2d 307 (1976)). Thus, it is unlikely that *Post* was removing the “perception of unfairness” when it “enhanced” the threshold evidence requirement. Subsequent decisions have continued to use the “perceived bias” formulation. See *GMAC v. Everett Chevrolet, Inc.*, 179 Wn.App. 126, 153, 317 P.3d 1074 (2014) *review denied*, 181 Wn.2d 1008 (2014), *Magana v. Hyundai Motor Am.*,

⁴ The modification by the Supreme Court adding a footnote number 3 makes the original decision’s footnote number 8 become footnote number 9.

141 Wn.App. 495, 523, 170 P.3d 1165 (2007), rev'd on other grounds, 167 Wn.2d 570, 220 P.3d 191 (2009).

Hon. Kirkendoll's potential or apparent conflict of interest was addressed in App. Br. at 26. The central orders under dispute from Hon. Kirkendoll stems from her March 31, 2017 ruling restoring non-intervention powers and allowing transfer of real estate from the Estate to Mrs. DuBois.⁵ CP 707-09 and her May 12, 2017 denial of the CR 60 motion to vacate that March 31, 2017 order based upon appearance of bias or fairness.

On May 12, 2017 Hon. Kirkendoll considered a CR 60 motion to vacate and a motion to reconsider her order entered on March 31, 2017 (transferring properties from the Estate to Mrs. DuBois). The motion to vacate was predicated upon allegations of an appearance of bias based upon her court staff's familial relationship with a non-party, Bryan Bartelson, involved in litigation with Spice. CP 810-13. The litigation was the subject of *Spice v. Bartelson* (No. 48075-1-II) (unpublished 2017); see also CP 846-860.

Byran Bartelson is Ms. Jennifer⁶ Bartelson's brother in law. CP 925. Jennifer Bartelson is married to Scott Bartelson, Bryan Bartelson's

⁵ A motion for stay was also denied, but this was not challenged.

⁶ Another Jennifer Bartelson is married to Bryan Bartelson. See CP 926.

brother. CP 925. Jennifer Bartelson put forward a declaration claiming that her and her husband have “minimal contact . . . since 2007” with Bryan Bartelson CP 926. She also claimed “we no social or familial interaction with Bryan and Jenny Bartelson.” CP 926. However, on March 6, 2015 Bryan Bartelson gave a deposition where he is a part owner of a trucking company with Scott Bartelson. CP 1164-65. This attempt at mitigating the relationship is alarming.

Bryan Bartelson is more than merely involved in ongoing litigation with Spice. He is also involved in attempting to purchase real estate from Mrs. DuBois of a co-owned property through the bankruptcy court trustee. CP 830-44. The sale is subject to “approval by the Superior Court” under “Probate Court” case no. 10-4-00037-5 per the residential real estate purchase and sale agreement. CP 836-37.

Courts, including staff, should err on the side of disclosure of facts. Instead this judicial assistant writes that she has “no social or familial interaction.” CP 926. The statement may be literally true, but it is carefully crafted to avoid revealing a relevant and important financial connection. Hon. Kirkendoll was left with an improper perception of the relationship as well, and indicated, “[t]he relationship between my judicial assistant and her brother-in-law, who they’re estranged from, is so far apart that it’s

an improbable argument to say that there would be any actual conflict.”

May 12, 2017 RP 11:18-22.

Hon. Kirkendoll acknowledged at least a subjective appearance of bias. She refused to vacate orders entered on March 31, 2017 but recused herself “because it’s clear that Mr. Spice has reached a point where he doesn’t believe he can receive a fair hearing in front of me.” May 12, 2017 RP 10:20-25.⁷

At least an appearance of unfairness and impartiality against Spice is created as a result of a court staff member being related to a person that is involved in litigation with Spice as well as having a real estate transaction for Estate property conditioned upon that court permitting the transaction. The perception and potential bias exists when a staff member can have an interest in the outcome of the proceeding before the court. A reasonably disinterested person could believe that a judge would have a bias toward family of a staff member in these circumstances.

The Estate claims “[n]o such [actual or potential] bias exists. The court entered the March 31, 2017[o]rder without any knowledge of the ‘issue’ later raised by Mr. Spice as to the judicial assistant being related by

⁷ Pursuant to that “voluntary” recusal Hon. Kirkendoll did not hear the motion for reconsideration scheduled at that time. *Id.* at 11:2-4, CP 987-88. Hon. Ashcraft subsequently denied the motion for reconsideration on October 27, 2017. The denial of Spice’s motion to vacate was also the subject of a motion for reconsideration ultimately denied by Hon. Ashcraft on October 27, 2017. CP 994-1023.

marriage to a party in a different lawsuit.” The Estate cites to no portion of the record for this assertion. The parties don’t know what Hon. Kirkendoll knew when deciding the matter. What is known is the perception of unfairness in having a decisionmaker’s staff member having an apparent interest in the outcome.

The Estate also claims that the issue is moot because Hon. Kirkendoll voluntarily recused herself and that reconsideration of her decision was made by a different judge that, supposedly, would be free from the bias. Resp. Br. 18. However, the reconsideration of a decision is different than an initial decision.

h. Conclusion

The trial court should not have transferred title to co-owned assets from the Estate to Mrs. DuBois. The title should have remained with the Estate until all creditor claims were resolved. Further, upon learning of the appearance of bias Hon. Kirkendoll should have vacated her title transfer order. The trial court erred in dismissing, under a summary judgment standard, the claims of Spice while discovery remained ongoing and in the presence of evidence from an accountant of damages. See CP 1475 (finding \$15,000 in unreleased rental proceeds due to Spice since October 2015 order dismissed Spice’s prior lawsuit).

DATED this January 7, 2019



Jonathan Baner, WSBA #43612
Attorney for Appellant, Ted Spice

CERTIFICATE OF SERVICE

I, Keegan Stanley, a person over 18 years of age, served: Court of Appeals division II and to **Mr. Patrick Hanis** a true and correct copy of the document to which this certification is affixed, Reply, sent via first class mail postage pre-paid. Mr. Hanis was also served via e-mail. I declare under penalty of perjury under the laws of the State of Washington that the forgoing is a true and correct statement. Signed at Tacoma, WA on 1/7/19.

Keegan Stanley
Keegan Stanley

Exhibit

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

In the Matter of the Estate)
of) COA NO. 48458-7-II
DORIS E. MATHEWS,) S/C NO. 10-4-00037-5
) MOTION FOR SUMMARY JUDGMENT

REPORT OF PROCEEDINGS

FRIDAY, OCTOBER 16, 2015

Pierce County Courthouse

Tacoma, Washington

Before the

HONORABLE RONALD E. CULPEPPER

Department No. 17

[Appearances on next page]

Reported by: Karla A. Johnson, RPR
Official Court Reporter, #82191

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1 FRIDAY, OCTOBER 16, 2015; MORNING SESSION

2 (All parties present.)

3
4 --oOo--

5
6 THE COURT: Well, I guess we're down to the
7 Estate of Doris Mathews, 10-4-00037-5. This is a
8 motion for summary judgment on, I guess, all the claims
9 that are pending.

10 MR. HANIS: It is.

11 THE COURT: So, Mr. Hanis, this is your
12 motion. A little background. I know neither of you
13 was involved in the trial Mr. Spice had in front of
14 Judge Hickman in the summer of 2012. So that was about
15 two years, nine months, eight months after Ms. Mathews
16 died. Is it your position that all the issues were
17 raised or should have been raised at that time?

18 MR. HANIS: Correct, Your Honor. In fact, in
19 the amended complaint filed by Mr. Spice in that
20 matter, he asserts essentially the same causes of
21 action he's asserting now in the 2013 cases that he
22 filed including claims for breach of fiduciary duties,
23 waste, accounting issues.

24 THE COURT: That you say if they're barred by
25 the statute of limitations, we don't even have to get

1 to that.

2 MR. HANIS: Correct, Your Honor.

3 THE COURT: So I guess I should let you make
4 your motion.

5 MR. HANIS: When we look at the undisputed
6 facts, Your Honor, Ms. Mathews died December 8, 2009.
7 We're coming up on six years from that day. When we
8 look at the pleadings, there are no disputes that
9 Mr. Spice and Mr. Payne were given proper notice of the
10 estate as creditors, a notice to creditors. They did
11 not file creditor claims for the issues here.

12 Mr. Spice did file a creditor claim that resulted
13 in the 2012 jury trial but did not file any sort of
14 creditor claim in this matter until 2013. The
15 four-month statute of limitations applies to a
16 creditors claim. If a creditor is not reasonably
17 ascertainable like Mr. Payne, then the four-month
18 statute applies to him as well. Even if the four-month
19 statute didn't apply, the two-year creditor claim
20 statute under RCW 11 would apply to bar their claims,
21 and even if that statute didn't apply for some reason,
22 the three-year statute of limitations as to oral
23 contracts would apply, and all these claims for wages
24 that arose prior to the death of Ms. Mathews would be
25 time barred.

1 THE COURT: Mr. Baner made what I thought was
2 kind of an unusual -- I can't find it here now. I
3 never heard of this: Plaintiff's claims are not barred
4 by three-year statute of limitations. Breach of oral
5 contract statute of limitations is three years from
6 date of breach. Mathews did not breach her contract
7 until her estate obtained a jury verdict in her favor
8 quieting title.

9 So Mr. Baner is saying that the oral contract
10 actions didn't start until two and a half years after
11 she died, so is she speaking from the grave? Well,
12 that struck me as an unusual claim.

13 MR. HANIS: It's not only unusual, but it's
14 not supported by law. In fact, the cases that
15 Mr. Baner cited support our position that even a
16 contingent claim, even if the debt isn't due as of the
17 date of death, a creditors claim must be filed within
18 the limitation period or the claim against the estate
19 is lost.

20 THE COURT: Well, this estate has been going
21 for five years or so now. In the administration of the
22 estate, what if the estate manager, the PR, does some
23 act of his or her own? Wouldn't you sue the estate
24 since the PR is representing the estate?

25 MR. HANIS: Sure. So those would be new

1 claims which wouldn't apply -- the creditor period
2 wouldn't apply to those claims. And so when we look at
3 the other claims for waste and misappropriation and
4 breach of fiduciary duty, first we need to remember
5 that the estate is not a fiduciary of Mr. Spice.
6 Mr. Spice is not a beneficiary of this estate. The
7 estate owes him no duties. He is nothing more than a
8 tenant in common on a couple pieces of property that
9 was awarded after a jury trial between the estate --
10 against the estate by Mr. Spice. So we look at, okay,
11 Mr. Spice has brought these claims, the primary claim
12 being that --

13 THE COURT: It's his property, at least
14 partly his property.

15 MR. HANIS: Partly his property. They have
16 varying degrees of ownership of three pieces of
17 property.

18 The waste claim is that there was a frozen pipe
19 that burst and that the estate should have discovered
20 this pipe burst and that because it didn't discover the
21 pipe burst, the estate is responsible for paying all
22 kinds of money to Mr. Spice because of the damage that
23 resulted. But the undisputed facts in the summary
24 judgment and not material in dispute establish that the
25 frozen pipe occurred during a time that the property

1 was being professionally managed by a property
2 management company that was ordered by the court and
3 that on March 31st, 2014, when the property management
4 company ceased to serve my client, the estate, on
5 behalf of the estate, went into the property three days
6 later and discovered a leak, took efforts to stop it.
7 The damage had already occurred. It had been occurring
8 over some period of time. Submitted a claim to the
9 insurance company, which was denied because it was a
10 frozen pipe and not an insurable event.

11 Mr. Spice offers no evidence in his declaration or
12 documents to show that somehow the estate is
13 responsible because a pipe froze and burst during the
14 time that the property was subject to a court-ordered
15 property management agreement.

16 Mr. Spice also alleges in the amended complaint
17 that there's problems with the financial aspects of how
18 the estate has handled monies received from rentals,
19 et cetera. And Your Honor may recall that we had two,
20 if not three, different hearings over this past summer
21 with Mr. Spice wanting to receive documents of
22 accountings, and you may recall that the personal
23 representative is in personal bankruptcy and so monies
24 are held in a bankruptcy account and disbursed pursuant
25 to bankruptcy court order.

1 THE COURT: What's the status of the
2 bankruptcy?

3 MR. HANIS: It's still pending until this
4 estate is resolved.

5 THE COURT: It's pending until the estate is
6 resolved and the estate can't resolve because she's in
7 bankruptcy.

8 MR. HANIS: Well, we can't resolve because
9 Mr. Spice keeps suing the estate. If we can get this
10 resolved, then the estate could actually move forward
11 with selling the properties and taking other action
12 with the properties, but we can't with these pending
13 lawsuits, and the 2012 jury trial was appealed by
14 Mr. Spice, and I understand oral argument is set to
15 occur in December, if I recall correctly.

16 THE COURT: What are the issues in that
17 appeal; do you know?

18 MR. HANIS: It's my understanding -- I'm not
19 the appellate attorney, but it's my understanding that
20 Mr. Spice disagrees with the jury verdict with respect
21 to how it apportioned the ownership percentages of
22 properties. Frankly, I read some of the appellate
23 documents and they're fairly disjointed as to what
24 Mr. Spice is wanting. It talks about Plexus. It talks
25 about an \$8 million promissory note. It talks about

1 ownership of property. It's kind of a jumbled mess.

2 In my mind, as I read the instant complaints that
3 are before the Court, this is Mr. Spice simply wanting
4 another bite of the apple when he lost and didn't reach
5 the outcome that he wanted in the jury trial and so he
6 renews his claims of financial abuse, which he raised
7 in the jury trial. He claims waste by the estate in
8 how we handled the rental properties, which he raised
9 in the jury trial. He claims all these similar types
10 of factual disputes that he's already presented to the
11 Court.

12 THE COURT: Well, Mr. Baner, there was a
13 trial in front of Judge Hickman, I think it was a
14 couple week long trial, 2012. Is there a particular
15 reason these things shouldn't have been litigated then?

16 MR. BANER: Yes, Your Honor. There are, I
17 suppose, two primary reasons, the first being that the
18 cause of action didn't accrue, which I understand is
19 sort of the burning question posed to me. And the
20 second --

21 THE COURT: Which cause of action are we
22 talking about? Aren't some of the claims with Doris
23 Mathews? She died in 2009. If It's a claim against
24 something that she did, wouldn't the creditor claim
25 statute start sometime soon after her death?

1 MR. BANER: The creditor claim statute
2 applies to claims against the decedent, that's true.
3 It applies just to the claims against the decedent.
4 The first question, I think, posed to me was --

5 THE COURT: Well, who is the oral contract
6 with?

7 MR. BANER: The oral contract is with the
8 decedent.

9 THE COURT: Okay. Well, if the creditor
10 claim statute applies to an oral contract with the
11 decedent and she's the decedent, why isn't that four
12 months after publication or two years outside?

13 MR. BANER: Yes, Your Honor. So with that
14 regard I posed two responses to that argument of the
15 estate, the first being that Mr. Spice actually did
16 present a creditor claim which resulted in the jury
17 trial, and the argument being there that the creditor
18 claim statute requires you to indicate who you are and
19 whether a claim is secured or not and kind of a
20 description of it; however, as long as you identify who
21 you are and the rest of it is not substantially
22 misleading, that claim is considered valid.

23 Now, I understand, of course, that the estate
24 would then say that, what Your Honor would ask me,
25 well, how come his wages weren't in there, or the fact

1 that he made a claim for a promissory note, that's
2 substantially misleading. I would disagree.
3 Substantially misleading implies an intention.

4 THE COURT: Isn't that what the trial was
5 about, his creditor claim he filed in 2010?

6 MR. BANER: Your Honor, I don't believe that
7 you have to bring a lawsuit on the creditor claim as
8 you described it in your creditor claim. I think the
9 creditor claim acts as a base requirement, you must do
10 this to alert the estate that there is a creditor out
11 there that has an issue with the estate and then
12 subject to normal commencement statute of limitations
13 and commencement statutes, you must commence cause of
14 action within -- whatever the statute of limitations
15 is.

16 The jury trial involved his claims for profits as
17 well as quiet title towards the property. That was the
18 issues for that trial, profits for development or also
19 quieting title at the time of Ms. Mathew's --

20 THE COURT: Well, what's the statute of
21 limitation that would apply to his claim against Doris
22 Mathews for an oral contract that she breached?

23 MR. BANER: Three years from the date of
24 breach.

25 THE COURT: Well, she died December 2009.

1 It's hard to see how she could possibly breach it later
2 than the day of her death, so that's December 2012 and
3 he didn't file it until April of 2013, did he?

4 MR. BANER: The dates are approximately
5 correct; however, I respectfully disagree with the
6 proposition that she could not breach an oral contract
7 from the grave. An oral contract can be breached.

8 THE COURT: Halloween is approaching.

9 MR. BANER: Of course. She couldn't herself
10 say no; however, she could act through her agent, and
11 her agent in this case being the personal
12 representative. And the agent didn't really breach
13 that contract until a jury verdict said you don't get
14 these properties.

15 THE COURT: The jury verdict said you don't
16 get these properties. How did Ms. Mathews or her
17 personal representative breach the contract? You've
18 got a legal decision by a jury.

19 MR. BANER: Of course, Your Honor.

20 THE COURT: So how does that breach the oral
21 agreement?

22 MR. BANER: At that point, Your Honor, that's
23 when Mr. Spice is entitled to bring a claim for wages.
24 That's when the contract has been breached, not that
25 the jury verdict --

1 THE COURT: So let's say the Court of
2 Appeals, for some reason, sends a case back and then
3 there's a second trial three years from now. Then if
4 he doesn't like that decision, could he file another
5 one?

6 MR. BANER: You mean another wage claim like
7 we're dealing with today?

8 THE COURT: This could go on forever. Isn't
9 that why we have statute of limitations, just to avoid
10 that?

11 MR. BANER: I think we are in a -- I don't
12 know the statute of limitations are particularly
13 designed to address that hypothetical, and, of course,
14 in the statute of limitations there are all sorts of
15 various ways the statute of limitations can be tolled;
16 however, I suppose the best analysis is after the jury
17 verdict, he then had a contract. His contract was that
18 he is supposed to get paid wages. At this point he
19 cannot develop the properties and he doesn't get to
20 keep the properties, so Mr. Spice then has a claim for
21 wages.

22 THE COURT: Well, the other issue, assuming
23 there was some claim not barred by the statute of
24 limitations, why wasn't that litigated at the trial?
25 If you've got a claim against the estate and

1 Ms. Mathews and you've got a trial involving the estate
2 and Ms. Mathews, why not present it at that trial? I
3 know you weren't his attorney at that time.

4 MR. BANER: I could see how that could be a
5 best practice. At the same time I could see how at the
6 time the jury would say, well, we're not awarding any
7 -- or I could see how a court would say: That claim is
8 not ripe yet; you can't bring that claim; where's the
9 breach; you've got all these properties; how has she
10 breached this oral contract.

11 THE COURT: And what were the terms of the
12 oral contract?

13 MR. BANER: That in the event he's not able
14 to obtain the properties or to develop the properties,
15 that he should be paid for at least his wages of
16 several years before.

17 THE COURT: How much does he claim his wages
18 were?

19 MR. BANER: It's spelled out in the
20 complaint. The only evidence -- well, that's not even
21 before the Court. \$75,000 for management. It's
22 \$75,000 a year for management.

23 MR. SPICE: You want me to talk?

24 THE COURT: No.

25 MR. BANER: No.

1 THE COURT: What proof do you have of that
2 claim?

3 MR. BANER: Your Honor, the first point I
4 wanted to raise was --

5 THE COURT: And I don't know what the -- I
6 think it's the dumbest name. People call it the "Dead
7 Man Statute." I think it's a terrible name. But,
8 anyway, there's a rule of evidence that bars evidence
9 of transactions with a deceased by an interested party.
10 Mr. Spice is certainly an interested party in his claim
11 for \$75,000. What evidence is there of this other than
12 him saying she promises him?

13 MR. BANER: Of course, Your Honor. And that
14 was brought out in the strict reply of the estate, and
15 I appreciate the argument and I don't have -- I was
16 unable to present a declaration to the Court in a
17 timely fashion regarding that. I could present one in
18 an untimely fashion.

19 THE COURT: Present away.

20 MR. BANER: Well, Your Honor, yesterday I did
21 file a declaration of Norma Woods and I'm later today
22 filing a declaration of Vitaliy Aksenov, both of which
23 present a declaration that talk about Ms. Mathews
24 promising to pay wages if things go south.

25 THE COURT: To Mr. Spice?

1 MR. BANER: To Mr. Spice, correct. But,
2 again, Your Honor, I didn't bring that to the Court
3 because it's not -- strictly speaking, I didn't get it
4 until yesterday. I filed it yesterday and the other
5 one I'm not getting until today. The first thing I
6 asked for in Mr. Spice's response was a continuance.
7 The strict reply brought out the issue of the Dead Man
8 Statute, and I can appreciate the court's position that
9 I should have anticipated that, but in the initial
10 summary judgment there wasn't argued that it wasn't an
11 oral contract. It was simply the claims are barred or
12 -- you know, the claims by the --

13 THE COURT: And you're saying the three-year
14 statute of limitations which might apply doesn't start
15 until after the trial in 2012, although Ms. Mathews had
16 been dead by that time for two and a half years or
17 more.

18 MR. BANER: One of the cases that I cited to
19 and was, of course, cited to in strict reply is a very
20 old Supreme Court case, Washington Supreme Court case,
21 which, you know, shows the same thing, where a man
22 promised an employee that he's going to have employment
23 for life. He dies; the employer dies. Three, four
24 years later he gets fired; the employee gets fired, so
25 the employee sues the estate, which apparently must

1 have still been active at the time. And the Supreme
2 Court says, Okay, I know the claim is a contingent
3 claim; however, you have to file that creditor claim
4 way back when, ostensibly to alert the estate that
5 there is someone out there that's claiming a benefit
6 from the estate. Now, the Supreme Court case didn't
7 talk about that oral contract being barred by the
8 statute of limitations, which is, as far as I know, is
9 oral contract. It was something that was not breached,
10 and the Supreme Court acknowledged that it was a
11 contingent claim that may or may not even be subject to
12 a lawsuit when the creditor claim must be filed. But
13 it's a fairly strict and perhaps overly strict
14 requirement of filing a creditor claim, what that
15 creditor claim is or when -- sorry -- what that
16 creditor claim needs to say and when you need to do it
17 as far as if it's against the decedent or against the
18 estate because it's only, of course, against the
19 decedent.

20 THE COURT: I was looking at one of Judge
21 Hickman's findings back in his decision. Somebody
22 filed a copy of that. On page 4, The Court also
23 repeats finding serious questions regarding the
24 legality of the documents upon which both parties were
25 relying on with regard to their contractual source of

1 attorney fees request, specifically a promissory note
2 and the Plexus operating agreement.

3 I'm not sure exactly what he's referring to. He
4 seems to think these are kind of questionable
5 documents. Do you know why he said that, either of
6 you?

7 MR. HANIS: I don't.

8 THE COURT: I know neither of you was
9 involved in that trial.

10 MR. HANIS: I know there were significant
11 issues related to claims of whether Ms. Mathews had
12 capacity or whether she was being unduly influenced,
13 being taken advantage by Mr. Spice. There were
14 documents that were, I don't think, necessarily written
15 by attorneys and were confusing. There were multiple
16 transactions and deeds. It was just a very convoluted
17 case.

18 THE COURT: I can't find it now. He had some
19 question about -- on page 3 he says, the Court further
20 finds any monies received by plaintiff's counsel during
21 this litigation more likely -- because there was a
22 dispute about attorney fees -- any fees received by
23 plaintiff's counsel more likely than not arose from the
24 original Estate of Doris E. Mathews and that the estate
25 should not be liable for any more payment to

1 Mr. Spice's attorney fees, or, in the alternative,
2 based on the lack of accounting for the hundreds of
3 thousands of dollars which were obtained through the
4 mortgage of Ms. Mathews' separate property and to this
5 day remains unaccounted.

6 Now, I don't know who he's saying didn't account
7 for it, if it's Spice or the estate, but he had some
8 questions about the bookkeeping, apparently, of the
9 parties. What's he referring to on that?

10 MR. HANIS: Your Honor, Ms. Mathews, prior to
11 meeting Mr. Spice, owned these properties free and
12 clear, and after meeting Mr. Spice there was
13 significant loans taken out. Mr. Spice was a Power of
14 Attorney. He had formed Plexus in which he claimed to
15 be 51 percent owner and purported to act on behalf of
16 Plexus where he was the sole decision-maker and the
17 sole manager and that Ms. Mathews had no rights.
18 Properties ended up being transferred into Mr. Spice's
19 name and he was largely in control of Ms. Mathews'
20 property and the monies that were garnered at a time
21 when money was being freely thrown around. It was
22 backed by real estate security. And there was just
23 simply no accounting or a very significant lack of
24 accounting ever provided even at the trial.

25 MR. BANER: Your Honor, I would like to talk.

1 Before Plexus Investments was formed, what happened was
2 Mr. Spice moved on temporarily to Ms. Mathews' property
3 and was a tenant of hers. They appeared to have hit it
4 off. They obviously hit it off; they eventually formed
5 some companies together. Before they formed Plexus
6 together, Mr. Spice formed Mathews Investment Fund or
7 Mathews Investment, something, LLC, for her to deal
8 with the properties.

9 At the time Mr. Spice had lined up a rather nice
10 opportunity to go and purchase himself a home, but
11 after meeting Ms. Mathews they decided to go into
12 business together. I don't want to go into too much
13 because I think the comments that were just made were
14 not really provided to the Court by any declaration.

15 THE COURT: They weren't.

16 MR. BANER: And I could appreciate that it's
17 background information, but I think that background
18 information should recognize that while Ms. Mathews was
19 alive, her and Mr. Spice were very close. The
20 declaration I got to late file indicates that.

21 Mr. Spice had helped her set up this one account
22 and was helping her to develop properties. These were
23 not little mansions on the prairie. There's a couple
24 of properties where the ultimate development was to
25 tear them down. The goal of these various small

1 residential areas was to turn it into a warehouse
2 complex that included some office space as well. I
3 understand that they were free and clear properties at
4 one point and then they used those properties to
5 generate capital to go into their business ventures.

6 But I think it's a little -- I don't want the
7 Court to have the impression that there has been any
8 finding that Mr. Spice has ever taken money from
9 Ms. Mathews and mortgaged properties of hers and then
10 ran off with that money. I, of course, am not in Judge
11 Hickman's mind. I don't know.

12 THE COURT: There isn't a finding of that,
13 but Hickman kind of alludes to it, it seems to me. I
14 have not spoken to him about that trial. Of course, I
15 wasn't there.

16 MR. BANER: And the other thing, Your Honor,
17 I believe in some of the things that were submitted in
18 that trial, there's a number of issues with the
19 attorney for the estate at the time, who's not
20 Mr. Hanis.

21 THE COURT: Well, if Mr. Hanis had been
22 there, there wouldn't have been any problems.

23 MR. HANIS: It would have been perfect,
24 Your Honor.

25 MR. BANER: Your Honor, I did have some

1 points on my response. In addition to the notion that
2 he filed the creditor claim that resulted in the jury
3 trial with Judge Hickman and the argument that that
4 creditor claim should be valid for these later wage
5 claims, the other point on that is that they were also
6 filed alternatively in equity and quantum meruit, that
7 the labor that Mr. Spice had done or Mr. Payne had done
8 on the property provided a significant benefit to the
9 estate properties. They benefited.

10 THE COURT: Well, would there be a different
11 statute of limitations for quantum meruit claims?

12 MR. BANER: Your Honor, I think they could go
13 back three years from the date of the work performed.
14 I believe all equitable claims in that regard are. For
15 me, the classic example of quantum meruit is you come
16 back, your house had been painted. You could order
17 your house painted. The contractor sends you a bill
18 and you say I didn't want this. Well, you got your
19 house painted. You're going to have to at least pay
20 for something for that benefit received.

21 It's a bit of a misstatement as well to claim that
22 these are the same claims; it's a second bite of the
23 apple. It's not a second bite of the apple. This is
24 about wages. This is about management of these
25 properties that has happened long after Ms. Mathews has

1 died. These are claims for water damage. Mr. Spice
2 claims rather insistently that this happened on the
3 estate's watch.

4 THE COURT: Let's start with the water
5 damage. So what's the evidence that the estate is
6 responsible for that? Mr. Hanis says it was a burst
7 pipe while it was being managed and then the insurance
8 didn't cover it.

9 MR. BANER: The insurance didn't cover it, in
10 part, because it was terrible insurance, it seemed.
11 Exhibit one, I believe, of Mr. Spice's declaration is
12 an email correspondence between Mr. Spice and SJC
13 Management. The first thing Mr. Spice asked: Hey, is
14 there any proof that this happened under the estate's
15 watch? Something to that effect, you know. He's
16 looking for evidence. He's clearly fishing for
17 evidence, to which Jason Clifford responds right away:
18 After the last eviction we gave the estate the keys
19 back. We couldn't do anything to fix the property.

20 They weren't going to do anything to help fix the
21 property. It was the estate responsible. Now, I could
22 appreciate that Jason Clifford is looking to throw
23 liability toward the estate; nevertheless, here on
24 summary judgment Mr. Spice's claims that it happened
25 under the estate's watch and Jason Clifford saying this

1 happened under his watch; it's not that clear. I'm not
2 trying to misstate it, meaning that it's a triable
3 issue of fact.

4 THE COURT: How much damage is at issue? As
5 I understand it, these buildings weren't in the best of
6 shape and some water damage wouldn't help it,
7 obviously.

8 MR. BANER: No. It seemed to have wrecked
9 one property and damaged but not quite wrecked the
10 other. One of the properties, I believe -- but
11 Your Honor asked. I think the foundation is sinking.
12 There is evidence in there talking about extensive mold
13 damage.

14 THE COURT: Well, okay. Let me ask you,
15 Mr. Hanis, to kind of go through the various individual
16 claims one at a time because Spice has some creditor
17 claims. He has some assigned creditor claims and then
18 he has some claims post Ms. Mathews' death against the
19 management of the estate.

20 MR. HANIS: You bet. So, Your Honor, he has
21 the alleged verbal agreement with Ms. Mathews where
22 he's seeking \$50,000 a year for managing the
23 properties, \$75,000 a year for supervising the
24 properties, and \$200,000 per year as the property
25 developer. And Judge Hickman found that Mr. Spice has

1 no property development experience.

2 That creditor claim was not filed until April of
3 2013. The claim was rejected and this lawsuit was
4 begun. The original creditor claim was filed in April
5 of 2010. It was rejected in July of 2010 and a lawsuit
6 resulting in the jury trial was brought by Mr. Spice,
7 and Mr. Spice apparently doesn't raise any of these
8 oral contracts because at that point he's not relying
9 upon some oral contract. That's developed years later.
10 Then he was relying upon some \$8 million promissory
11 note that Judge Hickman found isn't credible or isn't
12 applicable.

13 Then we have the Mr. Payne claims. Mr. Payne,
14 again, based upon an alleged oral contract from prior
15 to Ms. Mathews' death, all of his claims are for prior
16 to death. He, at some point in time, assigns those
17 claims to Mr. Spice.

18 THE COURT: And those were filed also April
19 of 2013?

20 MR. HANIS: Correct. And there's never a
21 filing prior to then related to Mr. Payne, and the
22 estate was aware of no claim by Mr. Payne until this
23 April 2013.

24 There was actually three other claims for oral
25 contracts that Mr. Spice filed at the same time and

1 started lawsuits with but then subsequently did a CR 41
2 dismissal of those other three oral contract claims, so
3 under the Jeffrey Payne oral contract and the Ted Spice
4 oral contract still exists.

5 Mr. Spice then alleges in this recent, recurrent
6 litigation that the estate owes him money as
7 contributions for his Plexus Investment LLC. Plexus
8 has never filed a creditors claim against the estate.
9 It filed a lawsuit in 2013, which it did a CR 41
10 dismissal. Plexus was part of the -- issues related to
11 Plexus, at least, were raised at the jury trial, and
12 Your Honor read some of Judge Hickman's ruling where it
13 addresses Plexus, and so those would also be barred res
14 judicata, but well more -- you know, more than two
15 years, almost three and a half years passed before any
16 of these Plexus contribution creditor claims against
17 the estate were raised.

18 So that takes care of those as far as claims
19 against the estate. Then we have the claims of
20 fiduciary duty, misappropriation of waste against the
21 estate post death. Mr. Spice claims that there was
22 gross mismanagement and dishonest and wasteful use of
23 the properties, that there was a willful and negligent
24 or negligent destructive maintenance of the property,
25 and his evidence is this frozen water pipe. And,

1 Your Honor, we submitted documents proving that this
2 occurred during the time of property management, and,
3 in fact, the declaration of Mr. Spice with the email
4 from Mr. Clifford backs that up, that this frozen water
5 pipe occurred during the time --

6 THE COURT: He's saying he turned the keys
7 over to --

8 MR. HANIS: Right. So the email is May 26,
9 2014. The Duboises take back over March 31st, two
10 months before, and discovered the frozen water pipe
11 three days later. They offered no evidence to show
12 that the estate knew of a water damage occurring prior
13 to March 31st and offered no legal basis of why the
14 estate would be responsible for the frozen water pipe.
15 Why isn't Mr. Spice responsible for the frozen water
16 pipe? If that's the standard, then he's subject to the
17 same standard. The fact is is that nobody is
18 responsible for the frozen water pipe because it was
19 just something that happens. Water pipes freeze and
20 they cause damage.

21 THE COURT: Do some people know that pipes
22 can freeze and take some action to insulate them and
23 keep them from freezing?

24 MR. HANIS: Sure. And I suppose SJC should
25 have done that in the several months, over a year that

1 it was managing the property. For 13, 14 months, it
2 was managing. It didn't do so. And there's no
3 evidence to show that the estate is somehow responsible
4 for that damage. It's not a disputed issue of fact,
5 material fact. Mr. Spice offers no evidence to show
6 that the estate was aware of the damage occurring and
7 that it should have taken some efforts to stop that
8 damage from occurring. Had my clients known that the
9 water was leaking in the house, they would have
10 responded, just like they did on April 3rd. The second
11 they discovered it, they took efforts to stop it and
12 they filed an insurance claim.

13 There is no fiduciary duty owed to Mr. Spice, as
14 previously mentioned. He's not a beneficiary of the
15 estate.

16 The final claim is the misappropriation. We've
17 been before Your Honor two or three other times related
18 to producing documents regarding the finances of rental
19 proceeds received by my client. Mr. Spice offers not a
20 single document, not a single check, nothing to support
21 any claim of misappropriation of monies.

22 The estate has brought this motion, has asserted
23 that there was no inappropriate handling of monies.
24 The burden shifted to Mr. Spice to show that there is a
25 material issue of fact and must present relevant and

1 admissible evidence to support that claim, and he has
2 failed to do so because none exists.

3 We have properly accounted for the property. It's
4 largely being administered under the bankruptcy with a
5 trustee oversight. Mr. Spice shows no
6 misappropriation, and his claims should be dismissed on
7 summary judgment.

8 THE COURT: Is the trustee, in fact, actively
9 administering anything or just getting reports?

10 MR. HANIS: I believe just getting reports.

11 THE COURT: Who is the bankruptcy trustee?

12 MR. HANIS: I'm not sure who the trustee is
13 on this one.

14 THE COURT: Okay. So, Mr. Baner, let's take
15 them kind of one at a time. I've heard from you, but
16 just in sum. First we have the verbal at-will contract
17 Mr. Spice is claiming. Mr. Hanis says it's barred by
18 one or two statutes of limitations, so response to
19 that?

20 MR. BANER: The response to that is what we
21 previously discussed, Your Honor, that the breach
22 didn't occur until post verdict, or, alternatively,
23 that quantum meruit applies, and that goes back to
24 three years of wages, or, alternatively, that the
25 prior -- well, not alternative.

1 THE COURT: Now, Payne's claim is also for an
2 oral contract, apparently.

3 MR. BANER: Yes, Your Honor.

4 THE COURT: That was filed April 2013. Why
5 isn't that barred by the statute of limitations, the
6 assigned claim for Payne?

7 MR. BANER: Your Honor, based upon the logic
8 I'm arguing for Mr. Spice, by necessity it must apply
9 to Mr. Payne. They can only go back in those three
10 years under quantum meruit.

11 THE COURT: And then the contributions from
12 Plexus, now, Ms. Mathews died in December. Is anybody
13 responsible to contribute -- after she dies, doesn't
14 her membership in the LLC end?

15 MR. BANER: I don't believe that her
16 membership ends. I believe her estate then takes over
17 the membership.

18 THE COURT: Doesn't the statute say something
19 about that? A person ceases to be a member of a
20 limited liability company upon various things if the
21 member dies.

22 MR. BANER: Does the first part of that
23 indicate unless otherwise agreed by the parties or
24 otherwise agreed by the members?

25 THE COURT: Does the formation documents say

1 anything about it?

2 MR. BANER: Actually, I think it does. It
3 does talk about errors in there. It's not before the
4 Court.

5 THE COURT: I don't think I have a copy of
6 it.

7 MR. BANER: It does talk about errors and it
8 certainly talks about not being able to voluntarily
9 withdraw. The question, of course, is voluntarily
10 withdraw the same as death.

11 MR. HANIS: It does not address death.

12 THE COURT: Do you have a copy of it?

13 MR. HANIS: I don't think I do.

14 THE COURT: There's probably one in the file,
15 but I don't remember any of the details of it.

16 MR. BANER: In any event, Your Honor, with
17 regard to the Plexus claims, the amount that Plexus has
18 been kind of shelling out has continued to increase.
19 There's currently a motion pending, as the reply points
20 out, before Judge Nevin that there's a LUPA action that
21 went up on appeal, and then right now the question
22 before Judge Nevin is whether the plaintiffs, who were
23 Doris Mathews and Mr. Spice and Plexus, who together
24 hired some attorneys to go and try and get water rights
25 from the City of Puyallup, and those were denied, and

1 that started the LUPA action.

2 THE COURT: When did that start? Before her
3 death?

4 MR. BANER: Yes, before her death.

5 THE COURT: And it's still pending?

6 MR. BANER: The CR 11 part is still pending.
7 There's also an appeal of the substance of it pending.
8 The CR 11 is whether or not the plaintiffs had a duty
9 to sub in the estate and their failure to do so caused
10 attorney fees, which the City is now seeking. That's
11 the argument that the City is proposing. We're not
12 here to litigate that, of course. But if there's a
13 judgment rendered by Judge Nevin, then it would be
14 Spice's and Plexus's position that the estate, because
15 the estate stood to benefit from a positive LUPA
16 result, that the estate should also indemnify him for
17 the cost of going in and trying to obtain that.

18 THE COURT: Has the estate been made a party
19 to that?

20 MR. HANIS: No.

21 MR. BANER: The estate voluntarily chose and
22 said that they're not a party.

23 THE COURT: Well, you can be made a party
24 involuntarily. In fact, most defendants don't
25 voluntarily.

1 The waste, the frozen pipe, what evidence is there
2 that the estate did something wrong here? Obviously,
3 you should take some reasonable measures to avoid pipes
4 breaking. That happens around here sometimes. What
5 evidence is there the estate had access to it at that
6 time and noticed that there was a problem?

7 MR. BANER: I have a couple points on that,
8 Your Honor. First, again, Mr. Spice is requesting a
9 continuance of this to obtain such, including deposing
10 Jason Clifford. Second, when we look at the email from
11 Jason Clifford, what does it say? It says that he gave
12 those keys and SJC didn't have access. The only person
13 that then must have had access was the estate. The
14 pipes burst when tenants weren't there. Tenants aren't
15 sitting there in a flooded place. Maybe they were, but
16 I don't think there's any evidence to suggest that. I
17 think reasonable implication of the evidence is the
18 pipes burst after the last eviction, which was when
19 although SJC Management might have had some managerial
20 capacity in name, they turned it all back over and said
21 "we're not managing this; this is your responsibility;
22 you're not going to pay to have repairs done; we can't
23 rent these units out." And they're not going in;
24 they're not doing anything with it.

25 Apparently what's happening is, there's a slow

1 water leak that's doing extensive damage to the
2 property. That's under the estate's watch.

3 THE COURT: But isn't it doing damage to the
4 property because nobody noticed it? The tenants are
5 not there, so they aren't reporting it.

6 MR. SPICE: They receive monthly billing
7 statements that had the leaks.

8 THE COURT: Most monthly billing statements
9 don't say "leak" in a charge. They'll say "water," I
10 suppose.

11 MR. SPICE: No, they said "leaks." They need
12 to be repaired and they wouldn't repair it, so they
13 quit.

14 MR. BANER: And that would be, I suppose,
15 more evidence to later bring forward if that can be
16 discovered.

17 THE COURT: What fiduciary duty does the
18 estate owe Mr. Spice?

19 MR. BANER: The estate owes a duty for all
20 estate property, for anyone that might have a claim
21 against that estate property, creditor or beneficiary,
22 but, additionally, they would owe him the duty as a
23 tenant in common, as the tenant that's got exclusive
24 control of that property per -- you know, according to
25 Jason Clifford. They've got to be making sure that

1 it's not on fire, that there's not a water leak.

2 THE COURT: But are tenants in common
3 fiduciaries for each other? I guess you could be a
4 partner and a tenant in common.

5 MR. BANER: At the very least a tenant in
6 common owes a duty to the other to not commit waste on
7 the property.

8 THE COURT: We've got the issue about the
9 leak. What other waste did they commit?

10 MR. BANER: So there's the leak and then
11 there's the mismanagement of properties where Mr. Spice
12 was managing these properties, they were rented, always
13 rented; they had money in reserves. When management
14 duties get turned over to the estate, they are no
15 longer being rented. They are no longer being up-kept.

16 THE COURT: If the plan was to tear them down
17 and build a warehouse or something, would you maintain
18 them? If you're going to tear them down, why would you
19 repair them?

20 MR. BANER: If you're not repairing them,
21 you're just driving them down into --

22 THE COURT: Was the plan to somehow develop
23 these as commercial or industrial property?

24 MR. BANER: Correct, Your Honor. It was to
25 develop it into a warehouse area. And there was only a

1 couple of the properties that were torn down and
2 getting rebuilt plans. And, you know, before you can
3 do anything of that, you've got to have the LUPA issue
4 resolved for the water and you also want to be having
5 cash brought into these. As the declaration of
6 Mr. Spice also talks about, he had been engaging in
7 trying to get refinances done on these properties as
8 opposed to once the estate takes over and there's no
9 more rental income or even when there is rental income,
10 they don't pay the mortgage; they don't pay the taxes.

11 THE COURT: Okay. Well, Mr. Hanis, there's a
12 certain appeal to the idea that a tenant in common has
13 to -- the one tenant in common who is controlling the
14 property has to make sure it doesn't decline in value
15 to the detriment of the other tenant in common.
16 There's some appeal to that. They don't have any duty
17 to each other?

18 MR. HANIS: I believe they would have a duty
19 not to commit waste. They have an undivided interest
20 in the property, an equal interest. Mr. Spice offers
21 no evidence to show that the estate has acted
22 inappropriately in how it's handled the property.
23 Mr. Spice has not shown -- I should back up. These
24 properties have been subject to the court's oversight
25 since the beginning, especially since the jury trial,

1 with property managers being appointed by the court and
2 being handled by the court. Some of the properties --

3 THE COURT: You're saying the court ordered.
4 I've never gotten a report from any of these properties
5 managers. I don't have eyes on this property. It's in
6 some theoretical sense.

7 MR. HANIS: Sure, but the court appointed a
8 property management. And now that the property
9 management has been ordered -- and there's another
10 professional property management. There's only a very
11 short window of time where the estate was managing the
12 property, and the properties that were tenantable were
13 rented.

14 THE COURT: Well, I'm ready to rule on quite
15 a few of these. With respect to the alleged verbal
16 contract for a contract of \$50,000 a year, \$75,000 a
17 year, whatever it is, that's clearly barred by the
18 statute of limitations. And the idea that this didn't
19 arise until after the jury trial, two and a half years
20 after her death, I think that's a new one on me. If
21 this isn't barred by the two year statute of
22 limitations -- I think it is -- it's clearly barred by
23 the three year statute of limitations since it was
24 filed in April of 2013, more than three years after the
25 death, more than two years after the publication and

1 notice to creditors. So I'm going to grant the motion
2 to dismiss those claims, Mr. Spice's claim.

3 I'm also going to grant the motion for the
4 assigned claim from paying, the same reasons. It's
5 barred by the statute of limitations. I think it's
6 barred by the two year statute of limitations. If it's
7 not, it's clearly barred by the three year statute of
8 limitations. It had to be filed by December 2009. It
9 wasn't filed until April of 2013. That would apply to
10 any other assigned claims. I guess they have been
11 dismissed, but that would apply to them as well.

12 With respect to the claims for contributions to
13 Plexus, Ms. Mathews' ownership in Plexus terminated in
14 December of 2009. The estate doesn't have any duty to
15 contribute to Plexus since their predecessor,
16 Ms. Mathews, is no longer a member of it, so I'm going
17 to grant the motion for summary judgment, dismissing
18 any claims for contribution to Plexus.

19 With respect to the waste, I'm going to grant the
20 motion to dismiss. There's no evidence that the estate
21 is responsible for the damage. There is evidence
22 damage occurred. Got that. There's a leak. Somebody
23 should have taken care of it. No evidence I see that
24 the estate was involved in the management when that
25 occurred. Once they got the keys back, they took some

1 action to remedy it and tried to get a claim, but
2 nothing to indicate they are responsible for waste.

3 With respect to the claims for breach of fiduciary
4 duty, they don't have a fiduciary duty to Mr. Spice.
5 It's clearly an adverse relationship here, certainly
6 after this jury decision has been appealed. So I'm
7 going to grant the motion to dismiss the claims for
8 breach of fiduciary duty.

9 The misappropriation, now, if I had some evidence
10 that they haven't accounted for things, that would be
11 fine, but I don't see it, so I'm going to grant the
12 motion to dismiss.

13 MR. SPICE: Your Honor, we did do an
14 accounting.

15 THE COURT: I'm going to grant the motion to
16 dismiss the claims for misappropriation. I see nothing
17 to support those claims in the record. I don't know if
18 there are other claims still out there.

19 MR. HANIS: Your Honor, Mr. Spice alleged
20 that the -- after the jury trial my client transferred
21 these properties into her own name. Mr. Spice brought
22 a motion. The court ordered her to transfer the
23 properties back into the name of the estate, which has
24 been done. Mr. Spice's claim that he has some sort of
25 claim for that, we believe that matter is moot. The

1 court already ordered those properties be transferred
2 back into the name of the estate, which occurred by
3 prior motion before this court, and that's something he
4 raises in his complaint.

5 THE COURT: What is it you're asking me to do
6 about that claim?

7 MR. HANIS: To dismiss the claim as moot any
8 sort of damage Mr. Spice alleges occurred.

9 THE COURT: So there's still tenants in
10 common on these properties?

11 MR. HANIS: They are.

12 THE COURT: Are they ever going to partition
13 them or sell them, or is this going to go on forever?

14 MR. BANER: Your Honor, it certainly seems to
15 be the estate's intention to partition based upon what
16 I've seen in the bankruptcy. I missed the first part
17 of your discussion. The quit claim deed -- we didn't
18 discuss that the improper quit claim deeds for --

19 THE COURT: I'm not sure what the issue is.

20 MR. BANER: Your Honor, on that one, whatever
21 damages could be proved happened over a fairly short
22 period, but on the order itself it specifically allows
23 for by motion attorney fees to be requested. I don't
24 think it says that they're granted, but it says that
25 Mr. Spice can seek attorney fees by motion.

1 THE COURT: Well, what Mr. Hanis was raising
2 was the deeds being returned to the estate. There was
3 some that Ms. Dubois signed or she deeded to herself
4 some properties. She was to return those. Has that
5 been done?

6 MR. HANIS: Yes.

7 THE COURT: Is that still an issue?

8 MR. HANIS: It's not.

9 THE COURT: Well, I don't think there's
10 anything for me to rule on that, so I'm not going to.
11 I'm going to grant the summary judgment on the issues I
12 just ruled on, if you can prepare an order.

13 And, of course, you've got 30 days to appeal this,
14 as you know, Mr. Baner.

15 MR. HANIS: Can I amend this a little bit?

16 THE COURT: Yes, why don't you work on it.
17 I've got something else I've got to prepare for, so
18 I'll be in my office, but I'll come out and sign it.

19 (Recess.)

20 THE COURT: So we are back on the Estate of
21 Doris Mathews case, 10-4-00037-5. The attorneys were
22 working on the order, and there's an issue about
23 something?

24 MR. HANIS: I have a proposed order for
25 Your Honor and I believe Mr. Baner may have some

1 responses to it.

2 THE COURT: Okay.

3 MR. BANER: Yes, Your Honor. I understand --
4 I thought I understood Your Honor's ruling. I thought
5 it was a five-part ruling --

6 THE COURT: Well, you've got a bunch of fact
7 findings here, Mr. Hanis. Do we really need that?

8 MR. HANIS: I guess we can remove the fact
9 findings. I thought Your Honor might want to just
10 glance through it and see what you're comfortable with
11 signing.

12 THE COURT: Mr. Baner?

13 MR. BANER: My ultimate recommendation was
14 going to be to come back for presentation next Friday
15 after having an opportunity to obtain a transcript of
16 Your Honor's ruling.

17 THE COURT: Is that a bad idea? I know you
18 don't get it done today, but there's certain sense to
19 that.

20 MR. HANIS: I would rather get it done today.

21 THE COURT: What if we have Mr. Hanis leave
22 his here and if you have a competing one, send it over
23 and then I can look them over and see if we need to
24 come back. I granted summary judgment on the various
25 claims. That's the important thing. If Mr. Baner

1 wants to review it a bit, I don't have any real problem
2 with that.

3 MR. HANIS: Okay.

4 THE COURT: Can you get me your proposal by
5 Wednesday? Is that enough time?

6 MR. BANER: Sure. I'm just going to go back
7 to the office.

8 THE COURT: And then what I might do is look
9 them over and then do like a telephonic conference to
10 see what the issues are and save everybody a trip here,
11 or if not, we'll see if we can sneak you in Friday.

12 JUDICIAL ASSISTANT: In the meantime, I'll
13 set it for Friday.

14 THE COURT: Let's set it for Friday for
15 presentation and we might not need it. So I'm going to
16 keep this order.

17 Did you get a copy of this, Mr. Baner?

18 MR. BANER: I did.

19 THE COURT: We'll just keep the whole file.
20 It would be easier.

21 MR. HANIS: Thank you, Your Honor.

22 MR. BANER: Thank you, Your Honor.

23

24

(The matter was concluded.)

25

BANER & BANER LAW FIRM

January 07, 2019 - 1:00 PM

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