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(Kitsap County No. 17-2-02040-18)

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

DEBORAH DUNN,
Plaintiff-Appellant,

v.

BREMERTON PILOTS ASSOCIATION,
Defendant-Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Deborah Dunn's neighbor, Ms. Yukiko Howell, named Ms. Dunn as Ms. Howell's Personal Representative in a Last Will and Testament filed for probate in King County Superior Court. Ms. Howell designated bequests to five charities in her Will, one of them being the Bremerton Pilot's Association.

Ms. Howell's Will provided that each charity receive "an amount equal to 10 percent (10%) of the value of my estate at the time of my death . . ." Ms. Dunn interpreted that to mean that *each charity* was to receive an amount equal to 10% and in 2013 paid each charity a \$15,000.00 bequest.

When Ms. Dunn filed a Declaration of Completion of Probate in December, 2013, other beneficiaries objected, and asserted that the charities had been overpaid.

Eventually, Ms. Dunn was removed as the Personal Representative and a Successor Administrator was appointed. In March, 2015, the Successor Administrator wrote to the Bremerton Pilot's Association ("BPA"), informed the BPA that the bequeath had been mistakenly overpaid, and requested repayment of \$12,018.03. Although other charities eventually repaid the mistaken overpayment, the BPA did not pay the demanded sum.

In August, 2015, the Superior Court Commissioner found that Ms. Dunn had overpaid the charities and ordered Ms. Dunn to personally repay the estate the amounts mistakenly overpaid. Ms. Dunn repaid the sums from her personal funds and received an assignment from the Successor Trustee to allow Ms. Dunn to seek repayment from the charities.

Ms. Dunn filed suit in December, 2017 against the BPA asserting causes of action for conversion and unjust enrichment. The undisputed facts showed that the first demand for return of the mistaken bequest to the BPA was made on March 19, 2015. Despite these undisputed facts, the Superior Court denied Ms. Dunn's summary judgment motion and granted the BPA's motion for summary judgment, dismissing Ms. Dunn's suit on the basis that Ms. Dunn's suit was untimely under RCW 4.16.080(2), which has a three (3) year statute of limitations.

This appeal presents the question of when the three-year statute of limitations commenced. Because the law is clear that the statute of limitations could not have begun to run until the date of the demand for return (i.e., March 19, 2015), the Superior Court erred in dismissing Ms. Dunn's suit as a matter of law. Ms. Dunn seeks reversal of the dismissal and seeks entry of judgment against the BPA for the mistaken overpayment (i.e., \$12,018.03).

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred in dismissing Deborah Dunn's causes of action for conversion and unjust enrichment, made following a mistaken overpayment of a bequest to the Bremerton Pilot's Association, where the undisputed facts show that the demand for the return of a mistakenly made bequest was made to the Bremerton Pilot's Association in March, 2015, making Ms. Dunn's suit, filed in November, 2017, timely under RCW 4.16.080(2).
2. The Superior Court erred in rejecting Ms. Dunn's Motion for summary judgment for conversion and unjust enrichment where the Ms. Dunn's legal right to return of the mistaken was unchallenged and where the undisputed facts show that the demand for the return of a mistakenly made bequest was made to the Bremerton Pilot's Association in March, 2015, making Ms. Dunn's suit, filed in November, 2017, timely under RCW 4.16.080(2).

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. For purposes of the tort of conversion of monies mistakenly (and in good faith) bequeathed to a party, does the statute of limitations commence at the time of the recipient party's wrongful refusal to return the monies following demand for the return of the monies, or at the time the monies were mistakenly bequeathed?
2. For purposes of the cause of action for unjust enrichment concerning monies mistakenly (and in good faith) bequeathed to a party, does the statute of limitations commence at the time of the recipient party wrongfully retains the mistaken benefit following demand for the return of the monies, or at the time the monies were mistakenly bequeathed?

IV. STATEMENT OF THE CASE

This case arises from the Estate of Yukiko Howell, filed for probate in King County Superior Court under Cause Number 13-4-01363-

8 KNT, and a provision in Ms. Howell's Last Will and Testament that provided a bequest to the Bremerton Pilot's Association ("BPA" or "Defendant"). Ms. Howell's Last Will and Testament, at Section IV, provided as follows:

IV. Bequest

I give, devise and bequeath to the five following organizations an amount equal to 10 percent (10%) of the value of my estate at the time of my death:

1. United Service Organizations, PO Box 96860, Washington D.C. 20077-7677
2. Help Hospitalized Veterans, 36585 Penfield Lane, Winchester, Ca. 92596
3. Bremerton Pilots and Tenants Association, Mel Journey Memorial Scholarship Committee c/o Port of Bremerton, 8850 SW State Hwy, Port Orchard, Wa. 98367
4. St. Rita's Catholic Church, 1403 South Ainsworth Tacoma, Wa. 98405
5. Woman in Aviation International, 12720 4th Ave. W., Suite F, PMB344, Everett, Wa. 98204-5707. (Declaration of Deborah Dunn, Exh. 1; CP 125 - 128).

The Appellant in this case, Ms. Deborah Dunn, was named as Ms.

Howell's Personal Representative as was so appointed on September 23, 2013.

Ms. Dunn interpreted Ms. Howell's Bequest as requiring that *each* of the five recipients named in Article IV receive 10% of Ms. Howell's estate and made payment of \$15,000.00 to each, for a total of

approximately 50% of Ms. Howell's estate. CP 121 – 122; Declaration of Deborah Dunn, Exh. 7; CP 204.

Ms. Dunn filed a Declaration of Completion of Probate on December 10, 2013. Declaration of Deborah Dunn, Exh. 3; CP 138 - 139. In paragraph 8 of the Declaration of Completion, she indicated her intent to make “final distribution from Decedent's estate to Decedent's remaining beneficiaries . . .” identifying the remaining beneficiaries as Mark Yantz, Erik Yantz and Lenora Howell. *Id.* In response, on December 18, 2013, heirs Phillip Howell and Cheryl Yantz, and devisees Lenora Howell, Erik Yantz and Mark Yantz petitioned the probate court for an order to show cause as to why Ms. Dunn should not be removed as the Personal Representative, and for other relief. Declaration of Deborah Dunn, Exh. 4; CP 146 – 155.

Beginning at page four of the motion, the Petitioners questioned whether Ms. Dunn had overpaid the charities (which included the Defendant BPA in this case) named by Ms. Howell in Section IV of her Last Will and Testament. CP 149 - 150. Ms. Dunn defended her actions, but on December 19, 2013, the Court Commissioner removed her as Personal Representative. Declaration of Deborah Dunn, Exh. 5; CP 157 - 158.

On July 16, 2015, the Successor Administrator petitioned the Court for various relief, including a judgment against Ms. Dunn for “improper and overpaid estate distributions to five charitable organizations . . .” Declaration of Deborah Dunn, Exh. 6; CP 160 - 166. In Successor Administrator’s Petition, the Successor Administrator alleged that after having received an accounting from Ms. Dunn, the Successor Administrator mailed correspondence on **March 19, 2015** to each charity requesting return of an “overpayment” from each of \$12,018.03. CP 188 - 189. The undisputed facts show that this was the first request of any kind to the BPA for the return of the alleged overpayment. CP 98 – 99; 105 - 106

BPA did not pay the amount or seek to intervene in the probate. The Successor Administrator’s report stated that as of July 15, 2015, none of the charities had returned the alleged overpayments. *Id.*; CP 162 - 163. Ms. Dunn filed her objection to the Petition on July 30, 2015. CP 202 - 211. In her ten-page memorandum, she detailed the basis for interpretation of Ms. Howell’s LWT to explain why the payments to the charities had been properly calculated and calculated in good faith. *Id.*

The parties’ disputed interpretations were resolved by Commissioner Velategui on August 5, 2015. Declaration of Deborah Dunn, Exh. 8; CP 213 - 217. The Commissioner concluded at page 3 that

each charity was entitled to *two percent* of Ms. Howell's estate and that Ms. Dunn had overpaid each charity (to include the Defendant here) by \$12,018.63. CP 215. Ms. Dunn was ordered to re-pay the estate \$60,090.15 as a result. The order, at page 4, authorized the Successor Administrator to assign to Ms. Dunn the right to pursue judgments against the charities for the overpayment determined by the Court. CP 216.

Ms. Dunn personally paid the estate all sums ordered by the Court in its August 5, 2015 order. Declaration of Deborah Dunn, Exh. 9; CP 221 - 222. In return, she received an assignment from the Successor Administrator on September 28, 2015. *Id.*; CP 219 – 220. Ms. Dunn thereafter presented her demand for payment to the charities in writing, which included a written demand to the BPA on September 29, 2015. Declaration of Deborah Dunn, Exh. 10; CP 224.

Although Ms. Dunn has received repayment from other charities, the BPA refused to refund the \$12,018.03 that the Court had found to be an overpayment. Ms. Dunn commenced suit on November 7, 2017. CP 1 - 21. The parties filed cross motions for summary judgment. Ms. Dunn argued that a) she possessed the clear legal right to collect the overpayment; b) that the BPA had converted the overpaid funds by wrongfully retaining the funds following the demand for their return; and

c) the BPA had been unjustly enriched by retaining a benefit it had received by mistake. CP 111 – 119; 222 – 236.

The motions were heard by the Honorable Leila Mills on March 9, 2018. After considering the cross motions, Judge Mills denied Ms. Dunn's motion and granted the BPA's motion, dismissing Ms. Dunn's suit:

THE COURT: Well, I am satisfied based upon all of the records before me, that on the issue of the statute of limitations, that the defendant prevails on this. I looked at this in the light most favorable to the nonmoving party on the issue of the statute of limitations. This has been filed beyond the statute of limitations. And, therefore, this warrants dismissal.

RP at 29; CP 252 - 254.

Ms. Dunn moved for reconsideration arguing that when a demand for the return of the property is necessary to make the tort of conversion complete, the statute of limitations does not begin to run until the demand has been duly made and the defendant has wrongfully refused to surrender the property. CP 257. Judge Mills denied Ms. Dunn's motion for reconsideration on March 26, 2018, while providing no further explanation for the basis for her ruling. CP 263 - 264. Ms. Dunn filed her Notice of Appeal of the orders on March 29, 2018. CP 265 - 273.

The BPA thereafter filed a motion seeking attorney's fees pursuant to RCW 4.24.185 and CR 11, which was denied.

V. ARGUMENT

A. *Standard of Review*

Appellate Courts review a summary judgment order *de novo*, engaging in the same inquiry as the trial court. *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976); *Mahoney v. Shinpoch*, 107 Wn.2d 679, 683, 732 P.2d 510. Summary judgment is proper if the records on file with the trial court show “there is no genuine issue as to any material fact” and “the moving party is entitled to a judgment as a matter of law.” CR 56(c).

B. *Ms. Dunn Was Entitled To Reimbursement After The Court Ruled On August 5, 2015 That An Overpayment Had Been Made.*

Although Ms. Dunn has been unable to find any reported cases in Washington authorizing a cause of action against a distributee who has incorrectly received more than the distributee’s share from an estate, the obligation on the part of the distributee to return such funds appears to be clear under common law principles in states in which the issue has arisen:

A distributee who has received more than his or her fair share in a distribution **must respond to demands for reimbursement when found in possession of other people’s money**. Thus, for example, when an heir is **unjustly enriched** by taking an undisclosed heir’s interest in an estate, the distributee will be compelled to account to the newly disclosed heir. The distributee

holds a constructive trust that was unjustly taken. The undisclosed heir holds a lien on the property **unjustly taken**, together with accruals.

Where a distribution is made under a partial or final accounting unconfirmed by the probate judge, the probate court may, before confirming that accounting, **order that the distribution be refunded to the estate, with interest.**

Executors and Administrators, Am. Jur. 2d Vol. 31 §924 (Second Ed.

2012) (footnotes omitted) (bolding added). Moreover,

unless the distribution or payment no longer can be questioned because of adjudication, estoppel or limitation, a distributee of property improperly distributed or paid, or a claimant who has been improperly paid, **is liable to return the property improperly received and its income since distribution.**

Id. at §928; (bolding added). Additionally, according to the *Restatement of the Law (Third) Restitution and Unjust Enrichment*, “[p]ayment by mistake gives the payor a claim in restitution against the recipient to the extent payment was not due.” *Id.* at Vol. I, § 6, p. 59 (American Law Inst., 2010). Defendant BPA has implicitly conceded that is the correct statement of the law in Washington, as it did not argue to the contrary, nor did it cite to any case law or secondary authorities indicating any contrary rules. Nor did BPA raise any other arguments as to why this should not be the law. Instead, the BPA asserted only affirmative defenses.

C. Ms. Dunn's Conversion Cause of Action Was Not Time Barred.

Conversion is rooted in the common law action of trover and occurs when a person intentionally interferes with possession of a chattel rightfully belonging to another, either by taking or unlawfully retaining it, thereby depriving the rightful owner of possession. *Davenport v. Wash. Educ. Ass'n*, 147 Wn. App. 704, 721–22, 197 P.3d 686 (2008); *Lang v. Hougan*, 136 Wn. App. 708, 718, 150 P.3d 622 (2007) (underlining added). Money may be the subject of conversion if the defendant wrongfully received it (*Davenport*, 147 Wn. App. at 722; *Westview Invs., Ltd. v. U.S. Bank Nat'l Ass'n*, 133 Wn. App. 835, 852, 138 P.3d 638 (2006)) and was under obligation to return the specific money to the party claiming it. *Davin v. Dowling*, 146 Wash. 137, 141, 262 P. 123 (1927); (see also *Seekamp v. Small*, 39 Wn.2d 578, 583, 237 P.2d 489, 492 (1951) and *Alhadeff v. Meridian on Bainbridge Island, LLC*, 167 Wn. 2d 601, 619, 220 P.3d 1214, 1223 (2009)).

It is black letter law that the statute of limitations dovetails with the “unlawful retaining” element, and that the statute of limitations does not commence until there is an obligation to return the property:

When a demand for the return of the property is necessary to make the tort of the defendant complete, the statute of

limitations does not begin to run until the demand has been duly made and the defendant has wrongfully refused to surrender the property.

Conversion, 18 *Am. Jur. 2d* § 105, p. 212 (2015). Moreover, “[a] demand is absolutely necessary where the original taking was lawful.” *Id.* at § 75, p. 194.

Here, BPA, by its own admission, received “its first notice of the issue” (i.e., the mistaken bequest) in **March, 2015**. (Posner Dec., p. 3; ¶ 11.) (CP 98 – 99; 105 - 106). The March 19, 2015 correspondence from the Successor Administrator informed the BPA that Ms. Dunn had mistakenly overpaid the BPA and the other charities, explained the basis for the overpayment, and requested repayment of \$12,018.03. *At that point* in time (i.e., March, 2015) the BPA *at the earliest* became under an obligation to pay back that portion of the mistaken bequest. The BPA was not “*under obligation to return the specific money to the party claiming it,*” by its own admission, until at the earliest March 19, 2015. Based on these undisputed facts the statute of limitations could not have begun to run until the Successor Administrator made the demand and the BPA wrongfully refused to surrender the property. Conversion, 18 *Am. Jur. 2d* § 105, p. 212 (2015).

While ultimately, the disputed interpretations of Mrs. Howell’s Last Will and Testament were not resolved by Commissioner Velategui

until **August 5, 2015**, when the Commissioner in his order concluded that each charity was entitled to two percent of Ms. Howell's estate and that Ms. Dunn had overpaid each charity (to include the Defendant here) by \$12,018.63, that does not help BPA as that date – which created its legal obligation to refund the wrongly overpaid funds – is *later than* that March 19, 2015 date.¹ By law, there was no “mistaken” payment to Defendant until the Commissioner's August 5, 2015 order. However, even in a light most favorable to the BPA, by law, the three-year statute of limitations would not have commenced until the March 19, 2015 demand and the BPA's “wrongful refusal” to repay the sum. Ms. Dunn's Complaint, filed on November 7, 2017, was filed well within the three-year statute of limitations. See RCW 4.16.080(2).

The Superior court erred in rejecting Ms. Dunn's motion for summary judgment and in dismissing Ms. Dunn's suit based upon the statute of limitations. As there is no dispute that the law allows recovery for mistaken distributions, and as the undisputed facts show that Ms. Dunn's Complaint was timely filed, judgment should be entered in favor of Ms. Dunn.

¹ Ms. Dunn notes that every possible date, the date of first notice (March 19, 2015), the date that Commissioner Velategui rejected the argument that the funds were correctly paid (August 5, 2015) or any *later* date by which the decision became final, are all within the three-year statute of limitation of the November 7, 2017 filing date of this action.

D. Ms. Dunn's Unjust Enrichment Cause of Action Was Valid.

Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it. *Young v. Young*, 164 Wn. 2d 477, 484–85, 191 P.3d 1258 (2008) (citing *Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn. App. 151, 160, 810 P.2d 12 (1991) (“Unjust enrichment occurs when one retains money or benefits which in justice and equity belong to another.”). According to the *Restatement of the Law (Third) Restitution and Unjust Enrichment*, “[p]ayment by mistake gives the payor a claim in restitution against the recipient to the extent payment was not due.” *Id.* at Vol. I, § 6, p. 59 (American Law Inst., 2010). The BPA has apparently conceded that is the correct statement of the law in Washington, as it did not argue to the contrary, nor did it cite to case law indicating contrary rules, nor suggest any reason why this restatement provision should not be followed.

In instances where unjust enrichment is found, a quasi contract is said to exist between the parties. *Bill v. Gattavara*, 34 Wn.2d 645, 650, 209 P.2d 457 (1949) (stating “the terms ‘restitution’ and ‘unjust enrichment’ are the modern designations for the older doctrine of ‘quasi contracts.’”); *State v. Cont'l Baking Co.*, 72 Wn.2d 138, 143, 431 P.2d 993

(1967) (“If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff’s case, as it were upon a contract, (quasi ex contractu) ...’ ”) (internal quotation marks omitted) (quoting *State ex rel. Employment Sec. Bd. v. Rucker*, 211 Md. 153, 157–58, 126 A.2d 846 (1956) (quoting *Moses v. Macferlan*, 2 Burr. 1005, 97 Eng. Rep. 676, 678 (1760))).

Three elements must be established in order to sustain a claim based on unjust enrichment: a benefit conferred upon the defendant by the plaintiff; an appreciation or knowledge by the defendant of the benefit; and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.” *Bailie Commc'ns*, 61 Wn.App. at 159–60, 810 P.2d 12 (quoting *Black's Law Dictionary* 1535–36 (6th ed.1990)) (see also *Lynch v. Deaconess Med. Ctr.*, 113 Wn.2d 162, 165, 776 P.2d 681 (1989) (stating elements as “the enrichment of the defendant must be unjust; and ... the plaintiff cannot be a mere volunteer.”)). In other words, the elements of a contract implied in law are: (1) the defendant receives a benefit; (2) the received benefit is at the plaintiff’s expense; and (3) the circumstances make it unjust for the defendant to retain the benefit without payment. *Young v. Young*, 164 Wn. 2d at 485.

Here, the BPA received more than it was entitled to receive and kept the overpayment “under circumstances mak[ing] it unjust . . . to retain the benefit.” The “circumstances making it unjust to retain the benefit” occurred when BPA received notice, first of a claim that the funds were improperly paid, and second when a Court determined that an overpayment had occurred. The analysis concerning the timeliness of Ms. Dunn’s suit is no different from the analysis concerning Ms. Dunn’s conversion cause of action, as an element of unjust enrichment is that there be circumstances which make it unjust for the defendant to *retain the benefit without payment*. *Young v. Young*, 164 Wn.2d at 485. The analysis concerning when the statute of limitations commenced is essentially identical to the cause of action for conversion, as the BPA’s election to “retain the benefit” could not arise until its receipt of the March 19, 2015 demand for payment from the Successor Administrator at the earliest, and more directly, the August 5, 2015 date when the Commissioner determined that the BPA had been wrongly overpaid.

E. Equitable Estoppel Was Not Available Under the Facts of This Case.

Although the Trial Court did not reach this issue, to the extent that the BPA attempts to raise other affirmative defenses not reached by the

Superior Court, undisputed facts also showed that the BPA's equitable estoppel affirmative defense was not available.

According to the *Restatement of the Law (Third) Restitution and Unjust Enrichment*, "[p]ayment by mistake gives the payor a claim in restitution against the recipient to the extent payment was not due." *Id.* at Vol. I, § 6, p. 59 (American Law Inst., 2010). "A mistaken payor has a claim in restitution when money is mistakenly transferred to someone other than the intended recipient." *Id.* at 60. Although the right to recovery is "subject to any affirmative defenses that may be available on the facts of the case" (*id.*; ¶ h at 72), the undisputed facts of this case do not provide such a defense. According to the *Restatement*:

c. Change of position through expenditure and consumption. When a claimant makes a payment that is otherwise subject to restitution, **the fact that the recipient has spent the money is not of itself a defense to liability in restitution, because an expenditure of funds-without more-does not constitute a change of position.** To be entitled to a defense on this ground, the recipient must demonstrate a causal relationship between receipt and expenditure: **in other words, that the expenditure is one that would not have been made but for the payment or transfer for which the claimant seeks restitution.** (Bolding added).

Because this causal relationship is usually conceded, the more important test relates to the nature of the expenditure. **Spending money is normally not a change of position unless the consequence of rejecting the defense (and imposing a liability in restitution) would be a net decrease in the recipient's assets.** Expenditures devoted

to extraordinary consumption; to gifts have this effect; ordinary living expenses, debt repayment, and the acquisition of capital assets generally do not. (Bolding and underlining added).

Id. at Vol. II, § 65, pp. 522 - 523.

BPA states that it raises funds and provides “training to scholarship recipients.” (Posner Dec. at p. 2, ¶¶ 3, 4) (CP 97). It raises money and then spends money on scholarships. Here, it did nothing different when it received the mistaken bequest. BPA’s stated defense is simply that it had “spent the money.” (Posner Dec. at p. 3, ¶ 9) (CP 98). However, this was “business as usual” for the BPA; i.e., the money from Ms. Howell’s estate (including the mistaken portion of the bequest) was received and was thereafter distributed. In other words, the “cash came in” and then “went out.” There is no evidence that the result of enforcing Ms. Dunn’s claim would result in a *net decrease* of the BPA’s assets. The BPA’s receipt of the sums for scholarship purposes, and its subsequent disbursement of the funds for scholarships, is not the type of “change in position” which supports an equitable defense to Ms. Dunn’s causes of action.

As a general proposition, equitable estoppel is not favored, and the party asserting estoppel must prove each of its elements by clear, cogent, and convincing evidence. *Mercer v. State*, 48 Wn. App. 496, 500, 739 P.2d 703, *review denied*, 108 Wn.2d 1037 (1987). The elements to be

proved are: first, an admission, statement, or act inconsistent with a claim afterwards asserted; second, action by another in reasonable reliance on that act, statement, or admission; and third, injury to the party who relied if the court allows the first party to contradict or repudiate the prior act, statement, or admission. *Board of Regents of Univ. of Wash. v. Seattle*, 108 Wn.2d 545, 551, 741 P.2d 11 (1987).

Although the BPA described that it received notice in July, 2013 that certain heirs were *contesting* a “Codicil” and an “Amendment” to Mrs. Howell’s Last Will and Testament, the BPA did not assert the position that it was placed on notice of any challenge as to the sums paid to the various charities. (See Posner Dec. at pp. 2 - 3; ¶ 7 (CP 97 -98); and Exhibit 1) (CP 101 - 102). Critically, the July, 2015 correspondence did not indicate such challenge. The correspondence, *did, however*, include a copy of Mrs. Howell’s Last Will and Testament. As such, the BPA had “equal means of knowledge” as to the content of Mrs. Howell’s Last Will and Testament. Where the parties have the requisite “equal means of knowledge,” there can be no equitable estoppel. *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 56, 79–80, 277 P.3d 18, 32 (2012); (citing *Waldrip v. Olympia Oyster Co.*, 40 Wn.2d 469, 244 P.2d 273 (1952)).

The BPA cannot demonstrate that it detrimentally changed its position following its receipt of the mistaken bequest because it spent funds in a manner consistent with its charitable mission. Additionally, there is no showing that the BPA distributed more than the sums it received to have somehow made its financial position worse off (i.e., that the payment to the scholarship recipients of the mistaken bequest somehow decreased its net assets). The affirmative defense is not available based upon the undisputed facts of the case at the time of summary judgement. The BPA, as the party asserting the affirmative defense at the time of summary judgement, had the burden of presenting the requisite facts, and failed to do so, and as such Summary Judgement should have been granted for Ms. Dunn.

VI. CONCLUSION

This Court should REVERSE the Court's denial of summary judgment and award judgment in favor of Ms. Dunn against the BPA for \$12,018.03, together with interest and Ms. Dunn's statutory attorney's fees and costs.

RESPECTFULLY SUBMITTED this 12th day of September, 2018.



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Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the 12th day of September, 2018, I filed the above and foregoing document with the Clerk of the Court of Appeals, Division II, State of Washington, and served a copy on counsel for Defendant-Respondent via e-mail, as follows:

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DATED this 12th day of September, 2018, at Tacoma, Washington.


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LAW OFFICES OF STEPHEN M. HANSEN

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