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No. 51676-4

(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 REPLY BRIEF

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I. INTRODUCTION

The BPA's opposition asserts that it was entitled to spend money (the mistaken bequest) it did not own, despite the clear legal authority holding that it was liable to return the sums it improperly received. In 24 pages of opposition, the BPA made no effort to dispute or distinguish the authorities presented by Ms. Dunn which confirmed its obligation to return the sums. It instead deflected its obligation by arguing it received a "gift" with "no strings attached." There were, however, "strings attached"; that being the requirement under law to return the mistaken overpayment to the heirs who rightfully owned the sums.

Ms. Dunn provided clear (and undisputed) authority to the Trial Court, and to this Court, that the statute of limitations on her conversion claim began to run on the date the Respondent wrongfully refused the demand for return (i.e., March 19, 2015). The BPA has cited no authority to the contrary. The BPA similarly failed to cite authority contrary to the authority cited by Ms. Dunn confirming Respondent's obligation to return the mistaken bequest.

As demonstrated below, the case authority presented by the BPA is either squarely off point or distinguishable, and in certain instances the

BPA conveniently and ironically ignored critical facts.[1] The undisputed fact of this case show that the affirmative defenses advanced by the BPA fail.

The Superior Court erred in dismissing Ms. Dunn's suit as a matter of law. Ms. Dunn is entitled to reversal of the dismissal. As this Court's review is de novo, Ms. Dunn is entitled to entry of judgment against the BPA for the mistaken overpayment (i.e., $12,018.03).

II. REPLY ARGUMENT

A. The Statute of Limitations on Ms. Dunn's Causes of Action Commenced Upon BPA's Wrongful Refusal to Return the Overpayment.

The BPA has failed to present any case law or authority which contradicts Ms. Dunn's position that the statute of limitations for Ms. Dunn's causes of action commenced at the time the BPA wrongfully refused to return monies it did not own. Instead, the BPA's statute of limitations argument at pp. 9 – 12 is premised upon Commissioner Velategui's December 19, 2013 order. At page 2 of the order, (CP 158), the order provides that "[i]f Ms. Darren [Successor Personal

[1] Respondent's contention that Ms. Dunn has omitted reference to Commissioner Velategui's December 19, 2013 is belied by the record as Ms. Dunn's Complaint directly references her December 13, 2013 order (CP 2), Ms. Dunn submitted the order to the Trial Court as Exhibit "5" to her Declaration in support of summary judgment, as well as to this Court in her Designation of Clerk's Papers (CP 158, 159). Given the BPA's wrongful refusal to return the monies following a demand first made in March, 2015, the simple fact is that the advent of the December 13, 2013 order is not determinative to the statute of limitations analysis.

Representative] is unable to recover the excess $50,000.00 Ms. Dunn paid to the charities, Ms. Dunn will personally pay that sum to the estate." In reliance upon that order, the Successor Personal Representative made demand to the BPA for the return of the funds approximately 15 months later on March 19, 2015. (CP 188-189). The BPA thereafter refused to return the overpayment.

The BPA's opposition ignores the authority which holds that the statute of limitations for conversion does not begin to run until a demand has been made and the defendant "has wrongfully refused to surrender the property." Conversion, 18 *Am. Jur. 2d* § 105, p. 212 (2015). The undisputed facts are that no "demand" was made until March 19, 2015. Absent the demand, the BPA could not have wrongfully refused to return the overpayment. The BPA has also failed to identify any authority contradicting the authority presented by Ms. Dunn which makes the advent of a demand a prerequisite for a conversion. ("A demand is absolutely necessary where the original taking was lawful." Conversion, 18 *Am. Jur. 2d* at § 75, p. 194.

Commissioner Velategui's December 19, 2013 order is not determinative to the statute of limitations for the causes of action asserted by Ms. Dunn: it did not confer or present a demand to the BPA. Given that no formal Findings/Conclusions were made as to the overpayment

until August 5, 2015[2] (CP 213-217), at the most, the December 19, 2013 commenced the time period upon which the demand for repayment could be made. Having not received a demand until March, 2015, the BPA's refusal (i.e., its wrongful retention of the overpaid funds) could not have been made any time earlier, and the statute of limitations for a conversion cause of action could not have commenced any time earlier.

The same analysis applies to the unjust enrichment cause of action. Unjust enrichment requires a) a benefit conferred upon the defendant by the plaintiff; b) an appreciation or knowledge by the defendant of the benefit; and c) the acceptance <u>or retention by the defendant</u> of the benefit under such circumstances as to make it <u>inequitable for the defendant to retain</u> the benefit without the payment of its value." *Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn. App. 151, 159 - 160, 810 P.2d 12 (1991) ("Unjust enrichment occurs when one retains money or benefits which in justice and equity belong to another."). Again, prior to the March, 2015 demand for return of the overpayment, there could be no "retention by the [BPA] . . . such circumstances as to make it inequitable for the [BPA] to retain the benefit."

[2] The BPA selectively omits this fact from its Statement of the Case at pp. 5 – 6.

B. The BPA's Retention Was "Wrongful."

The BPA has cited no authority to the Trial Court or to this Court contrary to the authority presented by Ms. Dunn holding that the recipient of more than his/her fair share of an estate distribution

a. must respond to demands for reimbursement when found in possession of other people's money;

b. is liable to return the property improperly received and its income since distribution; and

c. holds the distribution in constructive trust subject to a lien in favor of the rightful distributee until such return.

Executors and Administrators, Am. Jur. 2d Vol. 31 §§924, 928 (Second Ed. 2012) (footnotes omitted). Nor has the BPA cited any authority which holds that it is liable to the payor in a claim for restitution. *Restatement of the Law (Third) Restitution and Unjust Enrichment*, at Vol. I, § 6, p. 59 (American Law Inst., 2010).

Lynch v. Deaconess Med. Ctr., 113 Wn. 2d 162, 776 P.2d 681 (1989), cited by the BPA, does not support its position here. In *Lynch*, the issue presented was whether an attorney is entitled to compensation, from one other than his client, when services rendered to his client incidentally benefit another. There, Mr. Lynch, an attorney, pursued a claim on behalf

of his client (Ms. Tenney) against Medical Service Corporation ("MSC") for failing to pay medical expenses she incurred at Deaconess Hospital. MSC eventually reversed its position and provided coverage for Ms. Tenney's medical expenses. Mr. Lynch then brought against the Deaconess Medical Center to recover attorney fees from Deaconess. 113 Wn.2d at 163. Lynch appealed the summary judgment dismissal of the suit.

The Washington Supreme Court upheld dismissal on the basis that no-quasi contract existed between Lynch and Deaconess, and (more critically to this case) on the basis that the hospital had not been *unjustly* enriched by Mr. Lynch's services since Deaconess only recovered that amount which was owed and which had been declared uncollectible. 113 Wn.2d at 165. Citing the *Restatement of Restitution*, the Lynch court noted that "[i]t is well established that unjust enrichment and liability only occur where money or property has been placed in a party's possession such that in equity and good conscience the party should not retain it. 113 Wn.2d at 165–66.

Here, as the law clearly required repayment of the overage to the rightful heirs (see above at 5) and as the Commissioner had ultimately concluded as of August, 2015 that the distribution was improperly overpaid, *Lynch* does not support the BPA's position in any way. The

BPA's arguments at pp. 14 - 15 that it was not unjustly enriched are contrary to above-cited law before the Trial Court and this Court.

Nor do *BNC Mortgage, Inc. v. Tax Pros, Inc.,* 111 Wn. App. 238, 46 P.3d 812 (2002) or *Trane Co. v. Randolph Plumbing*, 44 Wn. App. 438, 722 P.2d 1325 (1986) support the BPA's position. Citing these cases, the BPA argues at p. 14 that it was a "volunteer." In *BNC*, the Court was asked to consider lien priorities and whether Defendant Tax Pro's lien should be equitably subrogated to BNC's following partial payment to Tax Pro from a BNC loan. 111 Wn. App. 238, 253, 46 P.3d 812, 821 (2002), overruled by *Columbia Cmty. Bank v. Newman Park, LLC*, 177 Wn. 2d 566, 304 P.3d 472 (2013)). The appellate court ruled that BNC was not entitled to equitable subrogation as it had voluntarily paid a portion of the Tax Pro lien. The Court observed BNC was a "volunteer," observing that BNC

> was not under any duty or compulsion to loan money to the Scotts, or to pay Ford. It had no interest in the Scotts' residence that it needed to protect. It did not act under any other duty or compulsion, but instead chose freely and voluntarily to avail itself of a business opportunity. Its hopes were to achieve a profit and, quite understandably, to secure itself against loss. That it may not realize those hopes is not by itself sufficient to warrant a judicial alteration of Washington's long-settled scheme of lien priorities.

111 Wn. App. at 254–55. The Court observed that equitable subrogation should be invoked when consistent with the doctrine's essential purpose,

"which is to provide for a proper allocation of payment responsibility," as it "impose[s] ultimate responsibility for a wrong or loss on the party who, in equity and good conscience, ought to bear it." Accordingly, the doctrine should be invoked "only where justice demands its application and where the equities of the party asking it are greater than those of his adversary." *Id*. at 254.

Here, neither party was a "volunteer": Ms. Dunn was under a legal duty to pay a bequest to the BPA per the terms of Ms. Howell's Last Will and Testament. When she mistakenly overpaid the bequest, the BPA was under the legal obligation to return the overpayment. The equities require the return of the overpayment.

The BPA next argues at pp. 14 - 15, without citing any case authority, that it was not "enriched" by the overpayment. This is directly contrary to the authorities cited by Ms. Dunn to the Trial Court (CP at 118-119), to this Court at pp. 14-16 in her Opening Brief, and above at 4. Similarly, the argument a p. 15 that Ms. Dunn should bear the loss ignores the BPA's legal obligation to return the mistaken overpayment.

The BPA cites to *Waldrip v. Olympia Oyster Co.,* 40 Wn.2d 469, 244 P.2d 273 (1952) for the proposition that Ms. Dunn should be estopped for her "silence," arguing (without any factual support or explanation) that "the Estate was on notice that Ms. Dunn had improperly calculated and

distributed the charitable gifts to charity – yet took no steps to notify BPA." Not only does this make no sense under the facts, the BPA's reliance on *Waldrip* is equally flawed: *Waldrip* holds that mere silence or acquiescence will not operate to work an estoppel where the other party has constructive notice of public records which disclose the true facts. Here, all matters within the Howell probate were public record. Additionally, *Waldrip* places the burden of establishing a waiver upon the BPA to show that Ms. Dunn knew or should have known that the BPA would rely and act upon her silence. 40 Wn.2d at 476.

C. Conversion Cause of Action Properly Established

The BPA spends four pages of its opposition (pp. 15 – 19) arguing that no conversion occurred when it refused to return the mistaken overpayment. This ignores the authorities cited by Ms. Dunn in her Opening Brief that "[p]ayment by mistake gives the payor a claim in restitution against the recipient to the extent payment was not due" (Brief at 10), that conversion occurs following a wrongful refusal to deliver property following demand (*Id.* at 11-12) and that a conversion can occur even where the original taking was lawful (*Id.* at 12).

One of the few cases cited by the BPA, *Seekamp v. Small*, 39 Wn. 2d 578, 237 P.2d 489 (1951), lends no support because there, the Plaintiff was unable to prove the conversion of a specific amount of money. The

Court concluded as a result, that the right of action did not lie in tort, but rather in contract, based upon a request for an accounting as to the proceeds received from the sale of the plaintiff's onions. 39 Wn.2d at 582. The Court also concluded, however, that a cause of action existed for "money had and received," a remedy founded on the principle that "no one ought unjustly to enrich himself at the expense of another," with "the gist of the action" being "that the defendant has received money which in equity and good conscience should have been paid to the plaintiff, and under such circumstances that he ought, by the ties of natural justice, to pay it over."[3] 39 Wn.2d at 584. That situation precisely describes the

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[3] *Davenport v. Washington Educ. Ass'n*, (infra) discussed the *Seekamp* Court's discussion of the "money had and received" remedy as follows:

> In *Seekamp v. Small,* the trial court granted a new trial because the plaintiff had not proved a common law cause of action for conversion. On appeal, the Washington Supreme Court held that even though the plaintiff had not proved a common law cause of action for conversion, the plaintiff had proved a common law action for restitution (which the court termed "[a]n action for money had and received"). The court explained:
>
>> [T]he failure of [the plaintiff] to prove a cause of action in conversion does not of itself justify the granting of a new trial. The complaint contained allegations sufficient to state a cause of action for money had and received and the record is replete **697 with evidence, admitted without objection, entitling [the plaintiff] to recover on that cause of action....

The *Davenport* Court then observed

> In *Bosworth v. Wolfe,* 146 Wash. 615, 264 P. 413, 417, 56 A.L.R. 1117, we said: "The action for money had and received was invented by the common-law judges to secure relief from the narrower restrictions of the common-law procedure, which afforded no remedy in too many cases of merit. The action is a modified form of assumpsit. It has gone through various

situation in this case, where the BPA has adopted a "finder's keeper loser's weepers" position.

Davenport v. Washington Educ. Ass'n, 147 Wn. App. 704, 197 P.3d 686 (2008) offers no assistance to the BPA. There, nonunion public-school employees brought action against public education employees'

> transformations; first from tort, then from contract, and afterwards into a remedy where there was technically neither tort nor contract. It is founded on the principle that no one ought unjustly to enrich himself at the expense of another, and the gist of the action is that the defendant has received money which in equity and good conscience should have been paid to the plaintiff, and under such circumstances that he ought, by the ties of natural justice, to pay it over."

On that basis, the *Davenport* Court analyzed whether the Plaintiff had alleged the facts needed for a common law cause of action for restitution:

> Sometimes termed a cause of action for "a contract implied in law" "quasi contract,"[57] or "money had and received," the common law action for restitution employs unjust enrichment as an independent basis of substantive liability. The *Restatement (Third) of Restitution and Unjust Enrichment* states:
>
> > A more important misconception is that restitution is essentially *a remedy,* available in certain circumstances to enforce obligations derived from torts, contracts, and other topics of substantive law. On the contrary, restitution (meaning the law of unjust or unjustified enrichment) is itself a source of obligations, analogous in this respect to tort or contract. A liability in restitution is enforced by restitution's own characteristic remedies, just as a liability in contract is enforced by what we think of as contract remedies.
>
> Unlike the law of conversion, which requires that the transferee have *wrongfully* received the property of another, the law of restitution requires only that the transferee have received the property of another under circumstances that result in the transferee's "unjust enrichment."

Davenport v. Washington Educ. Ass'n, 147 Wn. App. 704, 723 – 726, 197 P.3d 686 (2008)

union under Educational Employment Relations Act (EERA), alleging unlawful use of agency-shop fees received from payroll dedcuctions. No conversion occurred when upon the union's receipt of the deduction as the deduction was authorized by statute. As a result, it received the money with lawful justification. 147 Wn. App. at 722. No conversion occurred when the WEA thereafter used the money for political purposes because nothing in Washington law that existed at that time restricted the manner in which WEA could later use the money. WEA became the sole owner and possessor of the money transferred, and the nonmember did not obtain the "property right" necessary for conversion. 147 Wn. App. at 723.

Here, as detailed above, the BPA received the excess portion of the bequest by mistake. The BPA had no property rights in that portion of the bequest mistakenly paid, which belonged to the rightful heirs.

D. Equitable Estoppel Not a Defense

The BPA premises its equitable estoppel defense by characterizing the bequest as a "no strings attached" "gift." By law, however, the BPA did not own the portion of the bequest mistakenly paid, as that portion rightfully belonged to the heirs.

The BPA has ignored and cited no authority contradicting the rule that "[p]ayment by mistake gives the payor a claim in restitution against the recipient to the extent payment was not due" (*Restatement of the Law*

(Third) Restitution and Unjust Enrichment, Vol. I, § 6, p. 59 (American Law Inst., 2010)) or that "[a] mistaken payor has a claim in restitution when money is mistakenly transferred to someone other than the intended recipient." *Id*. at 60. The BPA does not dispute that "spending the money" is not of itself a defense to liability in restitution. *Id*. at Vol. II, § 65, pp. 522 - 523.

The fact that the BPA "spent the money" was not a change in position: the BPA did not demonstrate that it suffered a net decrease in assets, nor than it did anything other than pay out the sums as part of scholarships, which is what it routinely does in the ordinary course of its business. *Id.* The BPA cannot establish its entitlement to this affirmative defense.

E. Ms. Dunn Has Presented a Meritorious Appeal

This is the BPA's second attempt at a fee shifting motion. The BPA asserted to the Trial Court that Ms. Dunn's suit was frivolous and lost. [4]

RAP 18.9(a) permits an appellate court to award a party attorney fees as sanctions, terms, or compensatory damages when the opposing party files a frivolous appellate action. *Reid v. Dalton,* 124 Wn. App. 113,

[4] Ms. Dunn has requested that the Superior Court Clerk supplement the Clerk's Papers to include the Motion, Opposition, and Order Denying the Motion.

128, 100 P.3d 349 (2004). An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal. *Advocates for Responsible Dev. v. W. Washington Growth Mgmt. Hearings Bd.*, 170 Wn. 2d 577, 580, 245 P.3d 764, 765 (2010); (citing *Tiffany Family Trust Corp. v. City of Kent,* 155 Wn.2d 225, 241, 119 P.3d 325 (2005)). All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant. *Id.* Raising at least one debatable issue precludes finding that the appeal as a whole is frivolous. *Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd.,* 107 Wn.2d 427, 443, 730 P.2d 653 (1986).

The BPA asserts that Ms. Dunn and her counsel "avoided the substance" of the December 13, 2013 order; however, the BPA has failed to explain how the December 13, 2013 order (for purposes of the statute of limitations analysis) is relevant to the argument that the statute did not begin to run in March, 2015, when the BPA wrongfully refused to return the mistaken bequest following the Successor Personal Representative's demand. The fact that Ms. Dunn (correctly) determined that the advent of the December 13, 2013 order is not relevant to her statute of limitations analysis does not make her position "so devoid of merit that there is no possibility of reversal."

Ms. Dunn's appeal not only presents *numerous* issues upon which reasonable minds might differ, it has presented case law and legal authorities which the BPA has failed to even contradict.

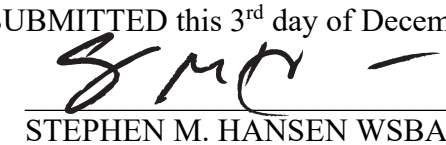
The BPA takes Ms. Dunn to task as to her citation to *Davenport v. WEA* (supra). Ms. Dunn's briefing correctly cites to Davenport for the standards of law applicable to the cause of action for conversion. While the outcome in Davenport is distinguishable on its facts, in no instance did Ms. Dunn attempt to argue that the factual basis for the holding in *Davenport* served as a basis for the relief requested in her appeal.

Finally, as to the equitable estoppel defense, the BPA ignores that it had no entitlement to the mistaken overpayment. The BPA ignored the authority presented by Ms. Dunn in support of her position. The BPA has wholly failed to show how these issues were somehow not debatable or that Ms. Dunn's position was void of merit, especially where it presented no authorities contrary to those presented by Ms. Dunn.

III. CONCLUSION

This Court should reverse the Trial Court's summary judgment of dismissal and enter judgment against the BPA in favor of Ms. Dunn.

RESPECTFULLY SUBMITTED this 3rd day of December, 2018.



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CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the 3rd day of December, 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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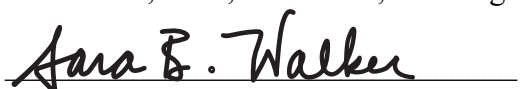

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