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No. 53746-0-II

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

DAVID J. DOUGHERTY, an Individual,

Appellant/Plaintiff,

v.

SAMANTHA R. POHLMAN, in her capacity
as Personal Representative of
the Estate of Raven J. Dougherty,

Respondent/Defendant.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

I.	INTRODUCTION	1
A.	The Dead Man’s Statute Does Not Apply to Documents or to Transactions with Third Parties, and it Does Not Bar a Party from Testifying About his Feelings or Impressions.....	2
1.	The Dead Man’s Statute Does Not Apply to Documents.	3
2.	The Dead Man’s Statute Does Not Bar David Dougherty From Testifying About His Feelings or Impressions.	3
B.	The Trial Court Erred by Dismissing David’s Claims as Untimely Because the Statute of Limitations Did Not Begin To Run Until December 2015 at the Earliest.	4
C.	Trial Court Erred in Dismissing David Dougherty’s Implied Contract Claims Because He Established a Prima Facie Case in Support of the Those Claims.	6
D.	David Dougherty is Exempt from Registration under RCW 18.27.090(12), and Therefore is Not Barred by the Contractor Registration Act (“CRA”) From Pursuing this Action.....	8
II.	CONCLUSION.....	11
	APPENDIX	

TABLE OF AUTHORITIES

CASES

<i>Alaska Pac. Trading Co. v. Eagon Forest Prods., Inc.</i> , 85 Wn. App. 354, 933 P.2d 417 (1997)	5
<i>Eckert v. Skagit Corp.</i> , 20 Wn. App. 849, 583 P.2d 1239 (1978)	5
<i>Erickson v. Kerr</i> , 125 Wn.2d 183, 883 P.2d 313 (1994)	2
<i>Hart v. Clark Cty.</i> , 52 Wn. App. 113, 758 P.2d 515 (1988)	4
<i>Hofsvang v. Estate of Brook</i> , 78 Wn. App. 315, 897 P.2d 370 (1995)	2
<i>Jacobs v. Brock</i> , 73 Wn.2d 234, 437 P.2d 920 (1968)	2
<i>King v. Clodfelter</i> , 10 Wn. App. 514, 518 P.2d 206 (1974)	3
<i>Thor v. McDearmid</i> , 63 Wn. App. 193, 817 P.2d 1380 (1991)	3
<i>Wallace Real Estate Inv., Inc. v. Groves</i> , 124 Wn.2d 881, 881 P.2d 1010 (1994)	5
<i>Wildman v. Taylor</i> , 46 Wn. App. 546, 731 P.2d 541 (1987)	2, 3
<i>Young v. Young</i> , 164 Wn.2d 477, 191 P.3d 1258 (2008)	6, 7

STATUTES

RCW 4.16.005	5
RCW 4.16.080	4

NO TABLE OF AUTHORITIES ENTRIES FOUND. TREATISES

KB Tegland, 5A <i>Washington Practice: Evidence</i> § 601.15 at 319 (6 th Ed. 2016)	3
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I. INTRODUCTION

David Dougherty designed and built a house on a parcel of real property in Buckley, Washington, that was owned by Raven Dougherty. That parcel had been awarded to Raven as her separate property in the Judgment finalizing their divorce in 2005. Despite the divorce, David and Raven remained in a committed relationship until sometime in late 2015.

At trial, David testified that he had built the house based on his understanding that Raven would convey a half-interest in the finished residence. When that did not happen, David testified that he had retained an attorney, Thomas Brennan, and that Mr. Brennan wrote to Raven in December, 2015, asking that she convey such an interest to David. The response to that request constituted the unequivocal repudiation that started the running of the three-year statute of limitations on his claim for unjust enrichment.

This action was timely filed within three years of Mr. Brennan's demand letter. The trial court erred when it ruled that the contents of that letter were barred by the dead man's statute, RCW 5.60.030, and dismissed David's claims of unjust enrichment and quantum meruit as being time-barred by the statute of limitations.

Further, David presented sufficient evidence at trial to establish a prima facie case for unjust enrichment and quantum meruit. The documentary evidence presented at trial, together with David's testimony as to the value he

contributed to construct the house on the Buckley Property, establish a prima facie case for his implied contract claims. Accordingly, the trial court's decision dismissing David's claims as a matter of law should be reversed and this matter should be remanded to the superior court for retrial.

A. The Dead Man's Statute Does Not Apply to Documents or to Transactions with Third Parties, and it Does Not Bar a Party from Testifying About his Feelings or Impressions.

Washington's dead man's statute, codified at RCW 5.60.030, bars an interested party from testifying "in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased." RCW 5.60.030. The purpose of this statute is to prevent self-serving testimony about conversations or transactions with the deceased. *Erickson v. Kerr*, 125 Wn.2d 183, 188, 883 P.2d 313 (1994); *Hofsvang v. Estate of Brook*, 78 Wn. App. 315, 897 P.2d 370 (1995); *Wildman v. Taylor*, 46 Wn. App. 546, 731 P.2d 541 (1987).

RCW 5.60.030 does not bar all testimony, however, only testimony that reveals a statement made by the decedent or that relates to a transaction with the decedent. *See Jacobs v. Brock*, 73 Wn.2d 234, 237, 437 P.2d 920 (1968). The statute does not bar *documentary* evidence, does not bar testimony about transactions with third parties, and it does not prohibit a witness from testifying about his or her feelings or impressions. These three limitations upon the dead man's statute are crucial to this case.

1. The Dead Man’s Statute Does Not Apply to Documents.

By its express terms, the dead man’s statute does not apply to documentary evidence. KB Tegland, *5A Washington Practice: Evidence* § 601.15 at 319 (6th Ed. 2016); *Thor v. McDearmid*, 63 Wn. App. 193, 202, 817 P.2d 1380 (1991) (“RCW 5.60.030 does not bar documentary evidence, although it may limit testimony about the documents.”). In *Thor*, the court held that it was error for the trial court to bar the admission of a letter purportedly written by the deceased. *Thor*, 63 Wn. App. at 202.

Here, the trial court properly admitted the letter from David’s attorney to Raven wherein David’s attorney requests that Raven convey a one-half interest in the Buckley property. CP 330-334; RP (7/31/2019) at 95:19–96:6. The trial court, however, erred by failing to consider this letter when dismissing David’s claims as untimely.

2. The Dead Man’s Statute Does Not Bar David Dougherty From Testifying About His Feelings or Impressions.

David Dougherty’s testimony regarding his own feelings or impressions is not barred by RCW 5.60.030. *Wildman*, 46 Wn. App. at 549; *see also King v. Clodfelter*, 10 Wn. App. 514, 516-17, 518 P.2d 206 (1974).

Here, the trial court erred when it held that David could not testify as to his belief that he would be compensated for the work he contributed to construct the residence:

Q. At some point in your life did you discover that you were not going to be compensated for building the house?

MR. NIEMELA: Objection, Your Honor. That's also prohibited by the dead man's statute because he's again, I think, eluding to what transpired between he and Ms. Dougherty.

THE COURT: Sustained

RP (July 31, 2019) at 91:2-8. The trial court erred in excluding this testimony because David's testimony as to his feelings and impressions is not barred by RCW 5.60.030. Further, the trial court erred when it precluded David from testifying about the letter written by his attorney (Ex. 2), and the response of Raven's attorney, which triggered the running of the statute of limitations on David's unjust enrichment claim. CP 336-39.

Because the trial court abused its discretion in prohibiting David's testimony, the decision of the trial court should be reversed, and in the subsequent trial, David should be allowed to answer these questions in support of his claims for compensation based on unjust enrichment.

B. The Trial Court Erred by Dismissing David's Claims as Untimely Because the Statute of Limitations Did Not Begin To Run Until December 2015 at the Earliest.

The statute of limitations for a claim of unjust enrichment is three years. RCW 4.16.080(3); *Hart v. Clark Cty.*, 52 Wn. App. 113, 116, 758 P.2d 515 (1988) ("The 3-year statute of limitations applicable to actions on unwritten contracts applies to an action for unjust enrichment.")

The statutory limitations period begins to run when a plaintiff's claim accrues. RCW 4.16.005. Generally, a cause of action accrues when a party has the right to apply to a court for relief. *Eckert v. Skagit Corp.*, 20 Wn. App. 849, 851, 583 P.2d 1239 (1978).

For an unjust enrichment claim to begin accruing, the unjust retention of the benefit conferred upon the defendant must be unequivocal. *See Alaska Pac. Trading Co. v. Eagon Forest Prods., Inc.*, 85 Wn. App. 354, 365, 933 P.2d 417 (1997) (in contract law, a “a court will not infer repudiation from ‘doubtful and indefinite statements that performance may or may not take place.’”) (internal quotation omitted); *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994) (contract law requires a “positive statement or action by the promisor indicating distinctly and unequivocally that he either will not or cannot substantially perform any of his contractual obligations.”) (internal quotations omitted). David's claim for unjust enrichment did not accrue until late in 2015, when Raven's repudiation of the benefit provided by David became unequivocal.

David's right to pursue a lawsuit against Raven did not accrue until David's attorney wrote to Raven's attorney in December 2015, requesting that Raven convey a one-half interest in the Buckley house and property to David. Ex 2. In fact, the limitations period arguably began in January 2016, when Raven's attorney informed David that Raven would not convey a one-

half interest in the house and property to David. CP 336-39. It was only after David received this unequivocal refusal to compensate him for his contributions to the construction of the Buckley house that David Dougherty had the right to apply to the court for relief for unjust enrichment and quantum meruit. Because David filed suit on August 1, 2018, within three years of December 2015, David's claims are timely, and the trial court's decision should be reversed. CP 1.

C. Trial Court Erred in Dismissing David Dougherty's Implied Contract Claims Because He Established a Prima Facie Case in Support of the Those Claims.

The trial court dismissed this case as a matter of law without entering any findings. If a case is dismissed as a matter of law, "the question on appeal is whether the plaintiff presented a prima facie case, viewing the evidence in the light most favorable to the plaintiff." *In re Dependency of Schermer*, 161 Wn.2d at 939. At trial, David presented a prima facie case of unjust enrichment and quantum meruit, and therefore the trial court's ruling should be reversed.

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, 191 P.3d 1258 (2008). To establish a claim for unjust enrichment, a plaintiff must establish the following elements: (1) the defendant receives a benefit, (2)

the received benefit is at the plaintiff's expense, and (3) circumstances make it unjust for the defendant to retain the benefit without payment. *Young* at 484-85.. In this case, all three elements of an unjust enrichment claim were established at trial through Raven's journal and David's testimony.

In her journal, Raven chronicled the construction of the house on the Buckley Property in great detail. Raven's handwritten notes and the photographs she includes in the journal show David's extensive involvement in the project. In designing and building the house on the Buckley property, David provided a substantial benefit to Raven in the form of his expertise and labor. It would be unjust for Raven to retain the benefit of David's contribution to the construction of the house without some payment to David.

Here, Raven's journal and David's testimony at trial establish all three elements of an unjust enrichment claim. As evidenced by that journal, Raven relied on David's experience as a home builder when she obtained his help building the house on her property. Given their recent divorce, David knew that he was building a house on Raven's property – property he did not own. It was evident that he expected payment for his work because he retained an attorney to request that Raven convey an interest in the Buckley Property in exchange for the house that David had built for Raven. RP (July 31, 2019) at 95:19 – 97:7; CP 330-334. By that time, Raven certainly knew that David expected to be paid for the work he had done, as

he was seeking a one-half interest in the Buckley Property as compensation for the house he had built on that property. At trial, David established the value of his labor and services in building the house when he testified that the value of the house he built was over \$200,000, exclusive of any profit or overhead. RP (July 31, 2019) at 102:15 – 103:7.

D. David Dougherty is Exempt from Registration under RCW 18.27.090(12), and Therefore is Not Barred by the Contractor Registration Act (“CRA”) From Pursuing this Action.

In its Brief, the Estate argues that the trial court’s dismissal of David’s claims should be upheld because, as an alternate ground for dismissal, David failed to comply with Washington’s Contractor Registration Act (“CRA”), RCW 18.27. That statute bars one from bringing an action for “the collection of compensation for the performance of any work” if the party seeking compensation was not registered as a contractor in Washington State. RCW 18.27.080. The Estate’s argument fails, however, because David was exempt from registration under the provisions of that statute. RCW 18.27.090(12).

As the Estate notes in its Brief, if a contractor has not registered as required by RCW 18.27.020(1), he or she is barred by RCW 18.27.080 from pursuing an action at law to collect compensation for any work the unregistered contractor has performed. RCW 18.27.080 provides:

18.27.080 – Registration prerequisite to suit.

No person engaged in the business or acting in the capacity of a contractor may bring or maintain any action in any court of this state for the collection of compensation for the performance of any work or for breach of any contract for which registration is required under this chapter without alleging and proving that he or she was a duly registered contractor and held a current and valid certificate of registration at the time he or she contracted for the performance of such work or entered into such contract.

David Dougherty is not barred from bringing any of the claims he has asserted in this case, however, because he did not build the Buckley house as a business pursuit; he built it as a personal residence in what he believed to be a partnership with Raven Dougherty so that the two of them would have a place to live and spend time together in Washington State. While the CRA bars any person engaged in the business or acting in the capacity of a contractor from bringing or maintaining any action in any court of this state for the collection of compensation for the performance of any work, it also provides an exemption for any person working on his or her own property or personal residence, whether or not the person occupies or owns the property. RCW 18.27.090 provides, in pertinent part:

RCW 18.27.090 - Exemptions

The registration provisions of this chapter do not apply to:

* * *

(12) Any person working on his or her own property, whether occupied by him or her or not, *and any person working on his or her personal residence, whether owned by him or her or not* but this exemption shall not apply to any person who performs the activities of a contractor on his or her own property for the purpose of selling, demolishing, or leasing the property;

(Emphasis added).

In the plain language of the statute, two kinds of persons are exempt from registration: (1) any person working on his own property, whether occupied by him (*i.e.*, an owner), and (2) any person working on his personal residence, whether owned by him or not (*i.e.*, a resident). Even assuming David had no ownership interest in the Buckley property, he was nonetheless exempt from registration under the provisions of the CRA because he was working on his personal residence.

In its Brief, however, the Estate argues that, “by the use of the word ‘residence’ the statute only applies to and exempts work on an existing structure, not wholesale construction.” This assertion is not supported by the statute or by any case law, and applying this exemption in the manner the Estate suggests would arbitrarily limit its extent. The term “residence” is not defined in the CRA. In its Brief, the Estate cites from Black’s Law Dictionary, but relies only upon one of the several listed definitions for the term “residence” therein, defining that term as “a house or other fixed abode; a dwelling.” Brief of Respondent, p. 40. In so doing, the Estate overlooks another definition listed in Black’s Law Dictionary, where the term “residence” is defined as “the place where one actually lives.” BLACK’S LAW DICTIONARY, p. 1423 (9th ed. 2009). Obviously, it is not possible to reside in a “house or other fixed abode” where one is in the process of actually building that structure. David clearly testified at trial, however, that the house he built was a place where he actually lived, both before and after the house was habitable.

David testified that, during the construction of the Buckley house, he lived in a motorhome parked on the property where the house was being built. VRP 79:3-5; 81:1-3. Raven Dougherty confirmed this in a letter she wrote in August, 2008, to Gordon Aleshire, an official at the Pierce County Department of Planning and Land Services. In that letter, Raven wrote: “We work on our Wa [sic] home during the winter and where we have extra money to complete it.” CP 249. Further, David testified that, after the house was completed, he resided in the house for weeks at a time. VRP 80:8-25.

When constructing the Buckley house, David was a “person working on his or her personal residence, whether owned by him or her or not.” As such, David was not required to register as a contractor under the CRA, and is not barred from bringing or maintaining any action in any court of this state for the collection of compensation for the performance of any work. Accordingly, the Court should deny the Estate’s request to affirm dismissal of this action based on David’s failure to comply with the CRA.

II. CONCLUSION

For the reasons set forth above, David Dougherty respectfully requests that the decision of the trial court should be reversed, and this matter should be remanded to the superior court for trial.

RESPECTFULLY SUBMITTED this 10th day of February, 2020.

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CERTIFICATE OF SERVICE

The undersigned makes the following declaration under penalty of perjury as permitted by RCW 9A.72.085.

I am a legal assistant for the firm of Vandenberg Johnson & Gandara. On the 10th day of February, 2020, I caused to be served via email and first class mail a copy of the foregoing document to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 10th day of February, 2020, at Tacoma, Washington.


LINDA S. COOK

VANDEBERG JOHNSON & GANDARA

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