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NO. 54711-2-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

MILWAUKEE AVENUE, LLC,

Respondent,

v.

TED SPICE and PLEXUS INVESTMENTS, LLC,

Appellant.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This appeal relates to a certain real property (the “11003 property”) that was co-owned by and actively used by appellant Ted Spice. Spice has two manufactured homes located on the 11003 property, one of which he lived in and the other from which he was earning rental income. Through circumstances beyond Spice’s control he has been dispossessed of his interest in the 11003 property and is now being required by court order to remove his mobile homes from the 11003 property at considerable expense to himself. Spice appeals to this court for relief from this unjust result.

The series of events leading up to the court order ejecting Spice and requiring him to remove his mobile homes from the property at his sole expense are as follows: The death of the other co-owner of the 11003 property, Doris Mathews; the appointment of Donna DuBois, the sole heir of the Doris Mathew’s estate (the “Estate”), as PR; the PR’s not recognizing Spice’s interest in the 11003 property; Spice’s bringing a legal action against the PR in the underlying probate action; Donna’s and her husband’s filing bankruptcy; the probate court’s allowing Donna as PR to transfer the title of the 11003 property from the estate to herself, which property then went into the bankruptcy estate; and the bankruptcy court’s ordering the sale of the 11003 property to respondent Milwaukee Avenue LLC (“Milwaukee”) even though Donna’s interest in the 11003 property was subject to closure of the ongoing probate matter.

The 11003 property was sold in 2019 to Milwaukee “with no conditions—as is.” The buyer was not a bona fide purchaser, as it was fully

aware of the above circumstances. Nevertheless, Milwaukee proceeded to bring an ejectment action against Spice, demanding that Spice at great personal expense to himself remove the two mobile homes from the 11003 property. At a hearing on Milwaukee's motion for summary judgment, the trial court first denied the summary judgment motion, but on Milwaukee's motion for reconsideration granted the motion and the issuance of a writ of ejectment. In granting the writ, the court also ordered that Milwaukee had the right to remove the mobile homes at Spice's sole cost and expense. Spice timely filed a motion for discretionary review, which this court granted.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in determining that Donna DuBois and subsequent purchasers, such as respondent Milwaukee, could treat the 11003 property as her own, and their own, before the probate of the Matthews Estate closed.

2. The trial court erred in determining that appellant Spice's waste and other claims against the Mathews Estate could be satisfied out of the proceeds of the Estate rather than title to Estate real properties.

3. The trial court erred in determining that there were no genuine issues of material fact, such that entry of partial summary judgment was proper.

4. The trial court erred in issuing a writ of ejectment.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Does the question of whether Milwaukee's indeterminate interest in the 11003 property as against the extent of Spice's creditor's claim remain unanswered until the probate proceedings are closed? (Assignment 1.)

2. Since Estate assets have been transferred from the Estate to Donna Dubois personally, is creditor Spice prejudiced by having his waste claims and other claims rendered useless by the lack of assets in the probate estate? (Assignment 2.)

3. Are there material issues of disputed fact relating to the issuance of a writ of ejectment? (Assignment 3.)

4. Should the trial court have waited until closing of the probate estate before ruling on Milwaukee's motion for a writ of ejectment? (Assignment 4.)

IV. STATEMENT OF THE CASE

This appeal arises primarily out of the interpretation of language in this Court's opinion in *Spice v. Estate of Mathews*, No. 50915-6-II (Wash. Ct. App. October 15, 2019) (unpublished) (Spice III) regarding title to real property subject to a pending probate. That appellate opinion contains the basic facts relevant herein and will be summarized for ease of reference.

The property at issue in this case is known as 11003 58th St. Ct. E., Puyallup, Washington (abbreviated as the "11003 property"). It consists of about 4 acres formerly containing a triplex, three houses and two pads for manufactured homes. The triplex is dilapidated and unusable, while the

other houses are in poor condition. The pads contain two manufactured homes owned by Spice and his company, Plexus Investments, LLC. Defendant/appellant Spice lived in one of the manufactured homes as his personal residence for about sixteen years, moving out in the fall of 2019. He rented out the other manufactured home to a tenant.

Spice originally acquired an interest in the 11003 property as co-owner with Doris Mathews before her death in 2009. Donna DuBois, the sole heir and the daughter of Doris Mathews, was appointed the personal representative of the Estate of Doris Mathews on January 8, 2010 in the probate case under Pierce County Superior Court cause number 10-4-00037-5. Spice filed a lawsuit against Donna DuBois under Pierce County Superior Court cause number 10-2-11622-8 alleging an ownership interest in various properties, and the Estate filed numerous counterclaims. Following a jury trial, the jury concluded, insofar as is relevant here, that the Estate owned a 75% interest in 11003 and Spice owned a 25% interest in that property. CP 114. This result was affirmed in *Spice v. Dubois*, No. 44101-2-II (Wash. Ct. App. Mar. 1, 2016) (unpublished)) (Spice I), a copy of which opinion is found at CP 110-124.

Spice filed a lawsuit in June 2013 against the Estate under Pierce County Superior Court cause number 13-2-09887-9 alleging various creditor claims. In November 2014, Donna, as the personal representative, conveyed the 11003 property along with others to herself personally. Spice amended his complaint to include breach of fiduciary duty by Donna's committing waste with regard to 11003 by not maintaining the property and

not acting prudently to collect rent from that property and other Estate properties, and that she, as personal representative, fraudulently conveyed Estate property to herself personally in November 2014. Spice's 13-2-09887-9 case was eventually consolidated with the probate proceeding, case number 10-4-00037-5.

The Estate moved for summary judgment dismissal of Spice's claims. In October 2015, the trial court dismissed Spice's claims, ruling that there was no evidence the Estate was managing the property when the alleged waste occurred and that the Estate did not owe fiduciary duties to Spice. CP 129; CP 147. The order granting summary judgment did not mention Donna's alleged fraudulent transfers. At the summary judgment hearing, the trial court stated that it "did not think there was anything to rule on" regarding fraudulent transfers. Spice III, n. 3, CP 147.

The court of appeals reversed and remanded Spice's waste claim for further proceedings. *Spice v. Estate of Mathews*, No. 48458-7-II (Wash. Ct. App. Dec. 12, 2017) (unpublished) (Spice II). CP 138. A copy of the opinion in Spice II is found at CP 125- 143.

Donna DuBois and her husband filed for chapter 11 bankruptcy in September 2013. CP 148. In January 2016, their bankruptcy was converted to a chapter 7 proceeding. *Id.* A bankruptcy trustee was appointed to liquidate the DuBoises' assets to pay debts. *Id.* The bankruptcy trustee found a potential buyer for the 11003 property, Bryan and Jennifer Bartelson. CP 148. The original contract for sale of the property noted that

the sale was contingent on the resolution of the Estate's probate proceedings and the approval of the bankruptcy court. Spice III, CP 148.

The Estate moved in superior court to transfer title of 11003 and other properties to Donna personally, which the court denied in January 2014. The Estate again moved to transfer the Estate property to Donna personally, and the trial court denied the motion in February 2014. Nonetheless, in November 2014, Donna, as personal representative of the Estate, transferred 11003 and other property to Donna, personally. Spice III, CP 150.

In January 2015, the trial court vacated Donna's November 2014 transfers, removed Donna's non-intervention powers, and prohibited further conveyances without court authorization. CP 150. Nevertheless, on March 12, 2015, Donna again transferred the 11003 property to herself as an individual. Spice alleged that he did not discover this transfer until February 2017. *Id.* He alleged that this transfer was a fraudulent transfer because it did not properly return title to the Estate to reflect Spice's 25% ownership in 11003, and thus impaired Spice's ability to secure financing. CP 153. The court of appeals in Spice III held that "taken in a light most favorable to Spice, a material issue of fact exists regarding the fraudulent transfer claim." Spice III, CP 171. The court of appeals reversed in part and remanded for further proceedings. CP 176.

On March 31, 2017 Judge Kirkendoll issued an order that restored Donna's non-intervention powers, allowed the transfer of all the Estate's

assets to Donna as an individual, and denied Spice's motion for a stay. Spice appealed this order. CP 150.

Meanwhile, on March 27, 2017, while Spice II was pending, Spice filed a lawsuit against the Estate under Pierce County Superior Court cause number 17-2-06511-6. CP 152. This case was later consolidated into the original probate proceeding, cause number 10-4-00037-5. *Id.* Spice amended his complaint in June 2017 alleging, among other things, fraudulent transfer of the 11003 property as well as other properties. *Id.* Spice alleged that these transfers were implemented so that Donna could claim them as assets of a trust. CP 153. Spice claimed that instead of transferring the properties back to the "Estate of Mathews," Donna transferred the properties to herself as the personal representative of the Estate. *Id.* Spice further alleged that these transfers were fraudulent and impaired his ability to secure financing. *Id.*

The trial court granted the Estate's motion for summary judgment of dismissal regarding some claims on October 27, 2017, and the remaining claims later by letter opinion. CP 154. This order of dismissal was entered less than two weeks before the court of appeals decided Spice II. *Id.* Spice appealed the order granting summary judgment as well as the order allowing transfer of the Estate's assets to Donna. Spice III, *Id.*

During the pendency of Spice III, the bankruptcy court ordered the sale of the 11003 property co-owned by Spice and the DuBois bankruptcy estate under 11 U.S.C. §363(h). *In re DuBois*, No. 13-46104-BDL (Bankr. W. Wash. June 10, 2019). CP 155. The sale was consummated on July 30,

2019 to Milwaukee Ave., LLC, a company owned by Bryan Bartelson, and the Bartelsons agreed that the sale was “with no conditions—as is.” CP 54.

The court of appeals in Spice III ruled that although federal law determines the debtor’s property interests that comprise the property of the bankruptcy estate, the debtor’s rights to property are determined by state law, citing *Northwest Wholesale, Inc. v. Pac Organic Fruit, LLC*, 184 Wn.2d 176, 187, 375 P.3d 650 (2015). CP 156. As a result, the bankruptcy estate takes the debtor’s interest in the property “as defined, determined, and encumbered according to state law.” *Northwest Wholesale*, 184 Wn.2d at 188. CP 156.

The court of appeals further analyzed the jurisdiction of the relevant courts as follows:

Under RCW 11.04.250, the title to real property immediately vests in an heir or devisee upon the death of the grantor, “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.” “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). Further, because a property interest is subject to claims against an estate during probate, probate proceedings may alter an heir’s interest. RCW 11.04.250; see *In re Peterson’s Estate*, 12 Wn.2d 686, 733-35, 123 P.2d 733 (1942).

Following her mother’s death in 2009, Donna’s property interests as the sole heir of the Estate immediately vested. See RCW 11.04.250. As a result, when Donna and Mark [DuBois] filed for bankruptcy, Donna’s property interests in the Estate became part of their bankruptcy estate. However, Donna’s interest in the Estate property has been, and remains to be, subject to this probate proceeding. Until this probate proceeding is completed, Donna’s interest—now her

bankruptcy estate's interest—is subject to the outcomes of probate. Only after the probate proceeding closes can Donna's resulting interests be treated as her own.

Spice III, CP 156. Stated another way, “[b]ecause Donna’s interest remains subject to the completion of probate, the bankruptcy estate’s interest in the properties [including 11003] is also subject to the completion of probate.” CP 158.

Milwaukee purchased the 11003 property on July 30, 2019 from the trustee in the DuBois bankruptcy as evidenced by a quitclaim deed from the trustee. CP 53-55. When Spice did not remove his two manufactured homes from 11003, Milwaukee filed the present ejectment action against Spice. CP 1-4.

Spice filed an answer, affirmative defenses and counterclaim. CP 5-9. The counterclaim alleged that (1) Milwaukee purchased the property “as is” with full knowledge that two manufactured homes owned by Spice were located upon the property, and (2) Milwaukee, knowing that it would take a lengthy period of time because of various regulations for Spice to remove the mobile homes, broke into one of the homes and rented it, and diverted the rent on the other home without authority, thus entitling Spice to damages for trespass to chattels, interference with contract and unjust enrichment. CP 8.

Spice also alleged as an affirmative defense:

The opinion in the court of appeals, *Spice v. Estate of Doris Mathews et al.*, # 50915-6-II filed on October 15, 2019, establishes that the interest in the Property that plaintiff [Milwaukee] acquired is subject to the completion

of probate in Pierce County Superior Court cause # 10-4-00037-5, which probate has not been completed, and the payment of the valid claims of creditors, including defendant Spice.

CP 6, ¶ 5.3.

Milwaukee filed a motion for partial summary judgment, essentially arguing that it had acquired title to 11003 by virtue of the trustee's quitclaim deed, Spice no longer had a right to leave the manufactured homes on the property, and as a matter of law Milwaukee was entitled to a writ of ejectment. CP 43-47. Milwaukee's motion did not address any of Spice's counterclaims. *Id.*

Spice opposed the motion for summary judgment. CP 78-86. He quoted language from Spice III to the effect that “[b]ecause Donna’s interest remains subject to the completion of probate, the bankruptcy estate’s interest in the properties [including 11003] is also subject to the completion of probate.” CP 82 quoting Spice III at CP 158.

Spice further argued that if he prevails on his claim in the probate case that Donna committed waste, her 75% real property interest in 11003 may be diminished to zero, thereby leaving the bankruptcy court with nothing to sell. CP 82.¹

The trial court denied Milwaukee's motion for summary judgment on February 14, 2020, finding there to be “disputed issues of material fact . . .” CP 195. The trial court indicated it would set a mandatory review

¹ Since Spice did not file bankruptcy, he also argued that the bankruptcy court would have no jurisdiction to sell his real property interest in 11003 if he were the sole owner of the property following the closing of probate. CP 82.

hearing six months out, as the parties would have to go before the probate court to get the property issue taken care of. CP 210.

Milwaukee subsequently filed a motion for reconsideration. CP 196. In the motion it argued that the sale of the 11003 property in the bankruptcy court was free and clear of all liens and the liens would attach to the proceeds. CP 199. Further, Milwaukee argued that “the Probate Court has ruled on the issue of transfer of assets and that ruling was affirmed by the Court of Appeals.” CP 201. Actually, the Court of Appeals in Spice III specifically did not address Spice’s argument that the transfer of real property was impermissible. CP 166.

Spice’s response reiterated that “because a property interest is subject to claims against an estate during probate, probate proceedings may alter an heir’s interest.” CP 223, citing RCW 11.04.250 and quoting Spice III at CP 156. Spice further argued that Milwaukee “does not have a ‘valid subsisting interest’ in the subject property as required under RCW 7.28.010 to bring an ejectment action, because the probate proceeding involving that property has not yet been completed, and the property is subject to the claims of creditors, including those of Spice. The trustee’s quitclaim deed by which Milwaukee acquired its interest in the 11003 property does not warrant that the trustee has any interest in the 11003 property. Such interest cannot be determined until the probate is completed.” CP 228.

The trial court apparently agreed with Milwaukee and granted Milwaukee’s motion for reconsideration, vacating its denial-of-summary-judgment order of February 14th. CP 334. The court also ordered the

issuance of a writ of ejectment to restore the premises at 11003 to Milwaukee. *Id.*

The trial court's reasoning was summarized as follows:

I understand the argument about interest [in the property]. The question is, what does that interest apply to. Is it the real estate or is it the sale proceeds as plaintiff is arguing?

Verbatim Transcript of Proceedings, March 6, 2020 at 5. The court answered its own question by concluding:

I don't think that what the Court of Appeals said [in Spice III] is necessarily at odds with anything that's happened so far in the case. The court of Appeals confirms that the Probate Court has the right to determine what Mr. Spice's interest is. It doesn't require that it be an interest in actual real estate. It's just an interest that could technically apply to sale proceeds since all a sale really does is change the form of an asset.

Verbatim Transcript of Proceedings, March 6, 2020 at 11.

Spice timely filed a notice of discretionary review. CP 340. Spice subsequently filed a motion for discretionary review, which was granted by a commissioner of this Court on May 29, 2020.

V. SUMMARY OF ARGUMENT

Because the probate of Mathew's Estate is pending and creditors' claims are still being resolved, Donna as the sole heir may not treat the Estate property as her own. Spice III, CP 156. Thus, when Donna transferred the 11003 property to herself individually, the title was of uncertain status. When the property was then transferred to the DuBoises' personal bankruptcy estate, the bankruptcy trustee acquired no more than

what Donna had to transfer, a title of uncertain status. When Milwaukee purchased the property from the bankruptcy trustee, Milwaukee acquired no more than what the bankruptcy trustee had, which again was a title of uncertain status.

Respondent Milwaukee essentially asserts that somewhere along the line in the transfers of the property, the title to the 11003 property transformed from one in which Donna could not treat as her own to one in which Milwaukee could now treat as its own. The trial court essentially adopted Milwaukee's erroneous position in granting summary judgment, articulating its rationale as follows:

The court of Appeals confirms that the Probate Court has the right to determine what Mr. Spice's interest is. It doesn't require that it be an interest in actual real estate. It's just an interest that could technically apply to sale proceeds since all a sale really does is change the form of an asset.

Verbatim Transcript of Proceedings, March 6, 2020 at 11.

This rationale is not an accurate restatement of the court of appeals' opinion in Spice III, which in point of fact stated "[u]ntil an estate is closed, the heirs may not treat estate real property as their own because a property interest is subject to claims against an estate during probate" and "probate proceedings may alter an heir's interest." Spice III, CP 156. Furthermore, the trial court's ruling improperly limits Spice's remedies to the "proceeds" in the Mathew's Estate. Because there are no proceeds in the Estate to be had, the trial court has effectively rendered Spice's claims in the probate court futile.

Moreover, the trial court has essentially treated Milwaukee as a bona fide purchaser having absolute title. But a bona fide purchaser Milwaukee is not. Milwaukee purchased the property “with no conditions—as is” and actively participated in the bankruptcy proceedings and probate proceedings. Instead, the trial court should have considered that Donna’s 75% real property interest in 11003 may be diminished to zero, thereby leaving the bankruptcy court with nothing to sell. It is inequitable to force Spice to spend excessive sums to move the manufactured homes which may ultimately not be required to be moved at all.

Genuine issues of material fact exist regarding the parties’ title interest in the 11003 property, and those issues are the province of, and will be resolved in, the probate court. Accordingly, this court should reverse the trial court’s summary judgment ruling, vacate the writ of ejectment, and remand to the trial court for further action following the close of probate.

VI. ARGUMENT

A. The Standard of Review for Summary Judgment and Errors of Law is De Novo.

Summary judgment decisions are reviewed on appeal de novo. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013). Summary judgment is only appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Issues of statutory interpretation are also reviewed de novo. *Hartson Partnership*

v. Goodwin, 99 Wn. App. 227, 231, 991 P.2d 1211 (2000); *Guardianship of Matthews*, 156 Wn. App. 201, 212, 232 P.3d 1140 (2010).

B. The Trial Court Erred In Determining that Donna and Subsequent Purchasers Could Treat the 11003 Property As Their Own Before the Probate Case Closed.

The vesting of Donna’s interest in the 11003 Property did not give Donna immediate absolute title to the property, whereby she could treat it as her own, rather the vesting gave her an uncertain interest to be determined only at the close of the probate. Furthermore, it cannot be conclusively presumed that Donna’s transfer of the 11003 property from the Estate to herself was necessary to Estate administration and therefore somehow resulted in the vesting of absolute title in Donna.

1. Vesting of Donna DuBois’ Interest in the 11003 Property is Subject to Estate Administration.

“While the legal title may vest in the heirs immediately upon the death of the ancestor, it vests subject to administration . . . and is not absolute until after the process of administration, so that the title may be divested by the process of administration” [citation omitted]. *Bickford v. Stewart*, 55 Wash. 278, 286, 104 Pac. 263 (1909), *affm’d on rehrng*, 55 Wash. 278, 106 Pac. 1115 (1910); *In re Estate of McAnally*, 3 Wn. App.2d 1049, n. 3, No. 35054-1-III (Wash. Ct. App. May 3, 2018) (unpublished). This is what gave rise to the court of appeal’s opinion in Spice III that “because a property interest is subject to claims against an estate during probate, probate proceedings may alter an heir’s interest.” Spice III, CP 156. The probate court acting under its equitable powers therefore could

divest Donna Dubois of her interest in the property, or even Milwaukee, as Milwaukee is not a bona fide purchaser for value without notice. *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 127, 233 P.3d 871 (2010).

2. Donna DuBois as PR of the Estate was Not Entitled to the Exclusive Presumption that Her Transfer of Title to the 11003 Property to Herself Personally Was Necessary to the Administration of the Estate.

The personal representative with *non-intervention powers* has the authority to “sell, exchange, convey” any assets of the estate and “[a] party to such a transaction and the party’s successors in interest are entitled to have it conclusively presumed that the transaction is necessary for the administration of the decedent’s estate.” RCW 11.68.090(1).

In this case, however, in transferring the Estate’s title to the 11003 property to herself, Donna was not acting under any non-intervention powers under RCW 11.68.090(1), as she filed a motion with the Probate Court to approve the transfer of Estate assets to herself as an individual.² CP 73-75. By invoking the court’s authority to rule on the issue, Donna lost any exclusive authority under her non-intervention powers and transferred that authority to the court. *In re Estate of Westall*, 4 Wn. App.2d 877, 886-87, 423 P.3d 930 (2018) (while superior court has limited authority to intervene in the administration of a non-intervention estate, the court regains authority if the PR properly invokes that authority by filing a motion for court approval of a PR’s proposed action).

² At the time the motion was filed, Donna DuBois’ non-intervention powers had been revoked.

Accordingly, when Donna DuBois transferred title to the Estate property to herself as PR, she was not acting as the PR of an estate with non-intervention powers but was acting pursuant to a court order. The conclusive presumption under the last sentence of RCW 11.68.090(1) that the transaction was necessary for the administration of the Estate therefore does not apply.³

C. The Trial Court Erred in Determining that Spice’s claims against the Mathews Estate Could be Satisfied Out of the *Proceeds* of the Estate rather than *Title* to Estate Real Properties.

In considering the issuance of a writ of ejectment, the trial court reasoned that Spice’s interest in the 11003 property “could technically apply to sale proceeds since all a sale really does is change the form of an asset.” Verbatim Transcript of Proceedings, March 6, 2020 at 11. By construing this Court’s opinion in Spice III to refer to “proceeds” instead of “title” to real property, the trial court undermined this Court’s rationale in Spice III that the interest an heir has in real property cannot be determined until the probate is closed. If a creditor’s claim attaches merely to “proceeds,” there may not be any proceeds left to pay the creditor and a title interest may be the only way that a creditor can be protected. This Court’s opinion in Spice

³ The beginning words to RCW 11.68.090(1) are “[a]ny personal representative acting under non-intervention powers may . . . [listing of powers].” The second sentence of RCW 11.68.090(1) also refers to “a personal representative acting under nonintervention powers.” Donna Dubois was not acting under non-intervention powers in transferring Estate properties, so RCW 11.68.090 does not apply. Moreover, Judge Kirkendoll’s order specifically applied RCW11.76.110, which does not apply in the normal non-intervention estate under RCW 11.68.090(1). Milwaukee’s Response to Motion for Discretionary Review, Appendix at A-043.

III does not mention the word “proceeds” and it is quite a stretch to apply proceeds in the bankruptcy context to proceeds in the context of a state court probate proceeding.

Furthermore, the trial court’s reasoning assumes that proceeds would be available in the probate Estate to satisfy spice’s claims. That is at least a material issue of disputed fact, as the Estate currently has insufficient assets to pay Spice’s creditor’s claim, except through title to Estate real property.

1. The Court of Appeals Did Not Affirm the Probate Court’s Transferring of Assets, as Asserted by Milwaukee.

Milwaukee made the assertion to the trial court that the Probate Court has already ruled on the issue of transferring assets through Judge Kirkendoll’s order entered on March 31, 2017, which order “was affirmed by the Court of Appeals.” Milwaukee’s Response to Motion for Discretionary Review at 7. That assertion is unfounded.

In fact, the court of appeals in Spice III expressly did not address whether Judge Kirkendoll properly ordered the transfer of Estate property to Donna DuBois. Spice III, *slp opn* at 23 (“Accordingly, we do not address this argument”).

Moreover, Judge Kirkendoll perhaps did not realize that by allowing Donna Dubois to transfer all the real estate assets of the Estate to herself individually, Donna’s interest in the properties would be subject to her individual creditors, as she was already in bankruptcy proceedings. If the assets had remained in the Estate, then Estate creditors would have been

paid before distribution of the assets to others. But once the assets were transferred outside the Estate, then all of Donna DuBois' creditors, attorneys, bankruptcy trustee, mortgage lenders, the IRS and numerous other people would have a claim on those assets, thereby considerably diminishing the assets available to pay Estate creditors. In other words, the claims of Estate creditors and individual creditors would become commingled, favoring the latter over the former. Necessarily, this would reduce the assets available to Estate creditors, such as Spice.⁴

Most likely this was the conscious choice of Donna DuBois. That choice hardly comported with her fiduciary duty as PR of the Estate. That duty has been succinctly described as follows:

"The executor is an officer of the court and in a fiduciary relationship to those beneficially interested in the estate. He is obligated to exercise the utmost good faith and utilize the skill, judgment and diligence that an ordinarily cautious and prudent person would employ in the management of his own affairs. *Hesthagen v. Harby*, 78 Wn.2d 934, 942, 481 P.2d 438 (1971); *In re Estate of Peterson*, 12 Wn.2d 686, 733, 123 P.2d 733 (1942). He must perform his duties not only for the benefit of the legatees but must also protect the estate from invalid and doubtful claims, *In re Estate of Shea's Estate*, 69 Wn.2d 899, 421 P.2d 356 (1966), while protecting the rights of valid creditors. *Kerns v. Pickett*, 49 Wn.2d 770, 306 P.2d 1112 (1957). It is his duty to settle an estate as quickly as possible but without sacrifice to the estate, *National Bank of Commerce v. Peterson*, 179 Wash. 638, 644, 38 P.2d 361 (1934), and he is liable for any breach of his responsibility which causes loss to another. *Hesthagen*

⁴ The claimed threatened loss of the 11003 property due to foreclosure is exaggerated. That foreclosure sale, as is not unusual with mortgage lenders, had been continued many times and likely could have been continued again.

v. Harby, [78 Wn.2d at 942]. His trust must be fulfilled with conscientious fidelity whether his charge is large or small. [*Wilson's Estate v. Livingston*, 8 Wn.App. 519, 527-28, 507 P.2d 902 (1973).]"

In re Estate of McAnally, No. 35054-1-III (Wash. Ct. App. May 3, 2018) (unpublished). Donna DuBois therefore favored her own creditors over Estate creditors, thereby violating her fiduciary duties to the Estate.

Further illustrative of that fact is Milwaukee's point that the "net proceeds of the sale are now held by the Bankruptcy Trustee." Milwaukee's Response to Motion for Discretionary Review at 7. In other words, these "proceeds" of which Milwaukee speaks are not even under the control of the probate Estate. It is highly speculative whether Spice will ever see any of these "proceeds," to be applied to his claims of waste, even assuming such proceeds eventually make their way back to the Estate at some time in the future, before being grabbed by the individual creditors of Donna Dubois.

2. This Court has Equitable Power to Divest Estate Property, Contrary to the Assertion of Milwaukee.

While Milwaukee essentially asserted that title to Estate property cannot be divested, it cites no authority for that position. In fact, a court of equity has broad powers, and such power includes the power to divest an heir of an interest in real property.

Particularly given the enormous, adverse impact on Spice – through not fault of his own – of Donna's fiduciary failings as a PR and her personal bankruptcy, the probate court should take into consideration the equities of the case. "Probate proceedings are equitable in nature." *In re Estate of*

Black, 116 Wn. App. 476, 483, 66 P.3d 670 (2003), *aff'd*, 153 Wn.2d 152, 102 P.3d 796 (2004). “The general rule is that probate proceedings represent an exercise of the trial court’s equitable powers . . .” *In re the Estate of Westall*, *supra*, 4 Wn. App.2d 877, 891.

In this regard a probate court has broad powers, as RCW 11.96A.020(1)(a) gives the court “full and ample power and authority under this title [Title 11] to administer and settle . . . [a]ll matters concerning the estates and assets of . . . deceased persons.” And RCW 11.96A.020(2) states,

If this title should in any case or under any circumstance be inapplicable, insufficient, or doubtful with reference to the administration and settlement of the matters listed in subsection (1) of this section, the court nevertheless has full power and authority to proceed with such administration and settlement in any manner and way that to the court seems right and proper.

RCW 11.96A.020(2).

Thus, Milwaukee’s assertion that the 11003 property cannot be divested from Milwaukee is simply not true.

D. The Trial Court Erred in Determining There Were No Genuine Issues of Material Fact, Such that Entry of Partial Summary Judgment and Issuance of the Writ of Ejectment Were Proper.

Milwaukee initiated the present ejectment action under the Ejectment, Quieting Title Statute, RCW Ch. 7.28. RCW 7.28.010 addresses who may maintain such an action and provides in relevant part as follows:

Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover

the same by action in the superior court of the proper county, to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title . . .

RCW 7.28.010.

Here plaintiff does not have a “valid subsisting interest” in the 11003 property under RCW 7.28.010 because the probate proceeding involving that property has not yet closed, and the property is subject to the claims of creditors, including those of Spice. The trustee’s quitclaim deed by which plaintiff acquired its interest in the 11003 property does not warrant that the trustee has any interest in the 11003 property. Milwaukee’s interest in the property will not be determined until the probate closes. In fact, the title company refused to insure Milwaukee’s title as to “any challenge to and/or claim against the Titled insured herein by Ted Spice, or any party or parties claiming by or through Ted Spice.” CP 190, ¶ 1.

Milwaukee nevertheless initiated the present ejectment action under RCW 7.28.130, which statute requires the defendant to plead the nature and duration of any interest claimed in the subject property. Milwaukee asserted that since Spice failed to plead the “nature or extent” of his interest, he is precluded from claiming any interest in the 11003 property superior to that of Milwaukee. Milwaukee’s Response to Motion for Discretionary Review at 10. This argument fails.

Spice filed an answer, affirmative defenses and counterclaim. CP 5-9. The counterclaim alleged that Milwaukee purchased the property “as

is” with full knowledge that two manufactured homes owned by Spice were located upon the property. CP 8.

Spice also alleged as an affirmative defense:

The opinion in the court of appeals, *Spice v. Estate of Doris Mathews et al.*, # 50915-6-II filed on October 15, 2019, establishes that the interest in the Property that plaintiff acquired is subject to the completion of probate in Pierce County Superior Court cause # 10-4-00037-5, which probate has not been completed, and the payment of the valid claims of creditors, including defendant Spice.

CP 6, ¶ 5.3. This affirmative defense, which was incorporated into Spice’s counterclaim, therefore gives adequate notice of Spice’s interest in the property under liberal notice pleading rules. CP 8. CR 8; *Champagne v. Thurston County*, 163 Wn.2d 69, 84, 178 P.3d 936 (2008) (“Washington follows notice pleading rules and simply requires a ‘concise statement of the claim and the relief sought’”).⁵

The trial court erred in ultimately granting of Milwaukee’s summary judgment motion, as there are genuine issues of material fact as to the parties’ respective interests in the 11003 property that are being litigated in the probate court. The court should stay the ejectment proceeding until the probate proceedings are closed.

E. Equitable Principles Require Reversal of the Trial Court’s Ruling.

⁵ Also, “[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.” CR 8(c).

Spice was minding his own business in the exercise of his property rights, when a sequence of events outside of his control has effectively stripped him of his property rights. Now, if the trial court's ruling is allowed to stand, Spice will be forced to incur the high cost of removing his manufactured homes from the property, which ultimately may not be required, depending upon what happens in the probate case.

As stated in *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 393-94, 13 P.3d 183 (2000):

Mobile homes are not mobile. The term is a vestige of earlier times when mobile homes were more like today's recreational vehicles. Today mobile homes are "designed to be placed permanently on a pad and maintained there for life." Roger Colton & Michael Sheehan, *The Problem of Mass Evictions in Mobile Home Parks Subject to Conversion*, 8-SPRING, J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 231, 232 (1999). "Once 'planted' and 'plugged in,' they are not easily relocated." *Miller v. Valley Forge Vill.*, 43 N.Y.2d 626, 403 N.Y.S.2d 207, 374 N.E.2d 118, 120 (1978). Moreover,

In most instances a mobile home owner in a park is required to remove the wheels and anchor the home to the ground in order to facilitate connections with electricity, water and sewerage. Thus it is only at substantial expense that a mobile home can be removed from a park with no ready place to go.

Malvern Courts, Inc. v. Stephens, 275 Pa.Super. 518, 419 A.2d 21, 23 (1980).

Physically moving a double- or triple-wide mobile home involves "unsealing; unroofing the roofed-over seams; mechanically separating the sections; disconnecting plumbing and other utilities; removing carports, porches,

and similar fixtures; and lifting the home off its foundation or supports." Colton & Sheehan, *supra*, 232. Costs of relocation, assuming relocation is even possible for older units, can range as high as \$10,000. *Id.* It is the immobility of mobile homes that "accounts for most of the problems and abuses endured by mobile home tenants." Luther Zeigler, *Statutory Protections for Mobile Home Park Tenants--The New York Model*, 14 REAL ESTATE L.J. 77, 78 (1985).

The effects on mobile home owners (home owners) faced with moving because mobile home park owners (park owners) want to convert a mobile home park to another use can be devastating. A home owner owns the mobile home, but only rents the land on which it sits. Closure and conversion of a mobile home park force the owner either to move, or to abandon what may be his most valuable equity investment, a mobile home, to the developer's bulldozer. Displacement from a mobile home park can "mean economic ruin for a mobile home owner." Karl Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 WIS. L. REV. 925, 956 n.179 (1989). See *Granat v. Keasler*, 99 Wash.2d 564, 663 P.2d 830 (discussing similar problems for owners of houseboats renting moorage), *cert. denied*, 464 U.S. 1018, 104 S.Ct. 549, 78 L.Ed.2d 723 (1983).

Manufactured Housing Communities, *supra*, 142 Wn.2d at 393-94 (Talmadge, J. dissenting).

These issues are exacerbated in Pierce County because of onerous codes prohibiting the storage of manufactured homes and even prohibiting the placement of manufactured homes on lots without being hooked up to water, electricity and sewer or septic services. CP 91-107. As noted above, the high cost of moving homes discourages the casual moving of manufactured homes from one place to another. Spice was not able to find a site upon which to place the two manufactured homes without incurring an exorbitant expense. A court of equity should consider these factors in

making rulings before an ultimate ruling has been made by the probate court on what rights the bankruptcy trustee acquired in 11003 before it sold the property to respondent Milwaukee Avenue, LLC.

VII. CONCLUSION

There are basic factual issues which need to be resolved in the probate court before the trial court, not the least of which is the nature of the real property interest the bankruptcy trustee—and subsequently Milwaukee herein--acquired in the 11003 property. This Court should reverse the trial court's order granting summary judgment and a writ of ejectment, and remand for further proceedings following the close of probate.

RESPECTFULLY SUBMITTED this 18th day of August 2020.

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