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68636-4

NO. 68636-4-1

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

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HYON PAK, et al.,

Appellants,

v.

DOMINIC SHIM, et al.,

Respondents.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Sharon S. Armstrong

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REPLY BRIEF OF APPELLANT

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I. ARGUMENT

1. Standard of Review

It is well established that findings of fact are reviewed under a substantial evidence standard on appeal. *McClearly v. State*, 173 Wn.2d 477, 514, 269 P.3d 227 (2012) (citing *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003)); *Merriman v. Cokeley*, 168 Wn.2d 627, 630, 230 P.3d 162 (2010) (citing *In re Marriage of Schweitzer*, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997)). Questions of law and conclusions of law are reviewed de novo. *Kiely v. Graves*, 173 Wn.2d 926, 933, 271 P.3d 226 (2012). The portion of this appeal that relates to the findings of fact should be reviewed under the substantial evidence standard while conclusions of law should be reviewed de novo.

The case before the Court is a civil matter. The above-cited standard of review on appeal is well established in case law for civil cases. Respondents cite the standard review from a criminal case and offer no case law to explain why a criminal standard of review should be applied to a civil case. Therefore, the abuse of discretion standard does not apply.

2. Respondents Did Not Meet Their Burden at Trial to Establish Mr. Pak Committed Legal Malpractice Resulting in a Breach of Fiduciary Duty Owed to Mr. Shim.

In the case of an attorney-client relationship, the duty of care must normally be established by the testimony of an attorney.

*Walker v. Bangs*, 92 Wn.2d 854, 601 P.2d 1279 (1979). Because of the unique nature of the field of law, it is often necessary to have expert testimony to determine whether an attorney breached their duty of care. *Geer v. Tonnon*, 137 Wn.App. 838, 155 P.3d (Div. 1 2007) (citing *Lynch v. Republic Publ'g Co.*, 40 Wn.2d 379, 243 P.2d 636 (1952)). Respondents failed to offer the testimony of an attorney or other expert on legal malpractice and the duty of care at trial. In their brief, Respondents attempt to cloud the facts of this case by emphasizing that Mr. Pak was subject to disciplinary proceedings. See RB 10. These proceedings have no bearing on the present case. The disciplinary proceedings were relevant to three specific clients, none of whom were Mr. Shim, and in the end, Mr. Pak ultimately did not contest his disbarment because he "didn't want to fight it anymore." RP 178. Respondents haphazardly argue that Mr. Pak's previous disciplinary proceedings replaced the need for an expert's testimony at trial; however they provide no

authority to support why existing case law should be disregarded. RB 12. This argument is unreasoned, not supported by authority, and clearly erroneous. An expert would have testified as to the alleged attorney-client relationship between Mr. Pak and Mr. Shim and not as to whether Mr. Pak breached a duty in an unrelated matter.

There are four elements which are necessary to establish a claim for breach of fiduciary duty: (1) a fiduciary duty gave rise to a duty of care; (2) there was an act or omission by the fiduciary in breach of the standard of care; (3) the plaintiff sustained damages; and (4) the damages were proximately caused by the fiduciary's breach of the standard of care. 29 Wash. Prac., Elements of an Action §12.1. Sufficient evidence was not offered at trial to support a claim for breach of fiduciary duty against Mr. Pak for his involvement with College Mart & Laundromat, Inc. (herein "College Mart"), the Washington Mutual Home Equity Line of Credit (herein "HELOC"), or the purchase of Etelos, Inc. (herein "Etelos") stock. In their brief, Respondents do not even address if the four elements of breach were met. Respondents instead choose to rely upon assertions of unethical conduct unrelated and irrelevant to the present case without citing clear authority.

3. Mr. Pak Did Not Commit Conversion Because He Never Denied Mr. Shim Access to Possession of His Property.

i. College Mart

To establish a claim for conversion, a plaintiff must prove by the preponderance of the evidence that he was deprived of possession of a chattel without lawful justification by the willful actions of another. *Westview Investments, LTD. v. U.S. Bank*, 133 Wn. App 835, 852, 138 P.3d 638 (Div. 1 2006) (citing *PUD Util. Dist. No. 1 of Lewis County v. Wash. Pub. Power Supply Sys.*, 104 Wn.2d 353, 705 P.2d 1195 (1985)). Respondents claim Mr. Pak committed conversion when he allegedly failed to return the proceeds from the sale of College Mart to Mr. Shim. RB 13-14. However, the record does not support this allegation. Mr. Pak was the escrow agent for Mr. Shim, and in this capacity he had several responsibilities, including paying the various debts Mr. Shim owed on the property. RP 98-99. Mr. Pak honored this obligation and paid off the multitude of loans, credit cards, and other expenses that Mr. Shim had accumulated. RP 100. Further, it simply does not make sense that Mr. Shim would decline the checks for over \$500,000 based on a dispute over \$30,000; nor does it seem

rationale that Mr. Shim would wait several years to file a suit to obtain these funds.

The funds that remained after a number of Mr. Shim's debts were paid off were deposited into the joint bank account which both Mr. Shim and Mr. Pak had access to. RP 268. As Mr. Pak explained, "that money went into that joint account and replenished it while I'm still making payments for all of the, all of the goods and services." RP 266. Mr. Pak continued to issue payments at the direction of Mr. Shim, including payments made to reimburse himself for the purchase of Etelos stock and maintenance of Mr. Shim's real property. RP 268. Mr. Pak was following Mr. Shim's instructions and "pay[ing] out the funds when he wanted them." RP 268. Because Mr. Shim had access to the funds in the joint account and the funds were used solely for his benefit, Mr. Pak could not have committed conversion with the proceeds from the sale of College Mart.

ii. HELOC

There is no evidence to support an allegation that Mr. Pak "knowingly applied for and received a line of credit...under Mr. Shim's name only." RB 14. The testimony and exhibits at trial clearly show Mr. Shim took out the HELOC in his individual

capacity. CP 18; Exhibit 60. Mr. Shim's signature is the only one that appears on the Washington Mutual "Agreement and Disclosure". Exhibit 60. Mr. Shim was an experienced businessman who managed multiple companies and had experience taking out loans. His allegation that he had no knowledge of the HELOC until 2008 is simply not credible given the evidence. Exhibit 60.

Additionally, Respondents' assertion that "Appellants mistakenly allege that the funds were deposited into a joint account" is without merit. Respondents do not offer any evidence to support this statement. RB 14. Furthermore, at trial, Respondents' counsel told the court in reference to the HELOC funds that "we have the bank statements to show it went to a joint account that was, that had both parties' names to it." RP 167-168. Moreover, the only evidence offered at trial further supports that the money was deposited into the joint account at the direction of Mr. Shim. See Exhibit 60. The document entitled "Line of Credit Initial Draw Request" is signed by Mr. Shim. *Id.* The box next to the statement "Deposit in my Washington Mutual Account" is checked and the checking account number that is provided is for the joint account. *Id.* After the funds were deposited into the joint account,

Mr. Shim directed Mr. Pak to reimburse himself for money he had contributed towards the Kingston Property and to pay for additional shares of Etelos stock for Mr. Shim. RP 58, 224. Mr. Pak was not depriving Mr. Shim of his property when he acted at his direction. When looking at the evidence and statements made at trial, the only conclusion that can be reached is that Mr. Shim took out the HELOC in his own name and knew the funds were being deposited into the joint checking account. Therefore, Mr. Pak could not have committed conversion.

4. Mr. Pak Did Not Commit Fraud Because He Disbursed Funds at the Direction of Mr. Shim.

i. College Mart

Mr. Pak did not misrepresent his intention to act as agent for Mr. Shim in the sale of College Mart because the distributions of the funds were at the direction of Mr. Shim. Every element of fraud must be proven by clear, cogent and convincing evidence. *Elcon Construction, Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 166, 273 P.3d 965 (2012) (citing *Williams v. Joslin*, 65 Wn.2d 696, 697, 399 P.2d 308 (1965)). Respondents had the burden of proving each element at trial and failed to do so. Mr. Shim approached Mr. Pak and requested his assistance in the sale of College Mart. RP 262. Mr.

Pak consented and agreed to help Mr. Shim. *Id.* As with previous transactions, Mr. Pak acted at the direction of Mr. Shim when distributing funds from the sale. RP 268. Mr. Shim testified at trial that Mr. Pak performed all the work he had expected of him including the payment of over \$700,000 worth of debts shown in the "Seller's Settlement Statement." RP 122-123; Exhibit 119. Mr. Pak also made distributions from the proceeds from the sale of College Mart to advance Mr. Shim money for his gambling and pay other debts Mr. Shim had incurred. RP 264-266.

Mr. Shim also acknowledges that Mr. Pak attempted to tender the proceeds from the sale of College Mart. RP 120-121. Mr. Shim claims he turned the proceeds down because a fee to pay Mr. Pak for all of the work he had performed had been deducted from the proceeds. RP 121-123. Even though Mr. Shim had seen three separate settlement statements showing this fee, on each occasion he did not dispute it. *Id.* However, according to Mr. Shim, when presented with a cashier's check for the proceeds of the sale, suddenly he refused the proceeds. *Id.* Although Mr. Shim had seen the fee deducted from the proceeds on three separate occasions prior to closing, he oddly chose the moment the proceeds of the sale were tendered to dispute Mr. Pak's

compensation. *Id.* Mr. Shim failed to dispute the fee, subsequently refused to accept the cashier's check after giving no indication the fee was improper, and baselessly brought a conversion claim against Mr. Pak when Mr. Pak made every effort to give Mr. Shim the cashier's check. *Id.*

Ultimately, Respondents failed to meet their burden of proof at trial to establish a claim for fraud. By Mr. Shim's own testimony, Mr. Pak complied with all of his obligations to make payments. RP 121. Mr. Pak represented he would perform a task, he performed it, and he never misrepresented his intention. Thus there can be no claim for fraud.

ii. HELOC

Similarly, Respondents failed to meet their burden of proof in establishing fraud against Mr. Pak for his involvement with the HELOC. A misrepresentation of a material fact is a necessary element of fraud. 174 Wn.2d at 166. A claim of fraud also requires that there be a "consequent damage" resulting from the misrepresentation. *Id.*

Respondents argue that Mr. Pak committed fraud based on the trial court's findings that Mr. Pak removed \$275,000 from the HELOC funds. RB 17. Mr. Pak does not dispute that he did this.

RP 224. Those funds were removed to reimburse Mr. Pak for personal funds he had contributed towards the cost of Etelos stock and the Kingston property. *Id.* The removal of these funds was for the benefit of Mr. Shim. *Id.* The trial court also found the funds were used to benefit Mr. Shim. CP 100. Ultimately, there can be no claim for fraud because there was no consequent damage to Mr. Shim.

5. Funds From the Sale of College Mart Should Not Have Been Included in the Total Recovery.

Mr. Shim should not be able to reap the benefits of having a corporation while at the same time not being required to follow the rules of corporate structure, including that an individual cannot sue on behalf of a corporation. The fact that a corporation has not done business for a number of years and has no property except the claim being sued upon does not enlarge a stockholder's rights to sue for an injury to the corporation or its property. *Ninneman v. Fox*, 43 Wn. 43, 46 (1906) (questioned in *Hunter v. Knight*, 18 Wn. App. 640 (1977) on other grounds). Furthermore, a stockholder cannot bring an action against a third person for breach of contract between the third person and corporation. *Id.* at 45. It is irrelevant that the complaining stockholder is the owner of all of the stock. *Id.*

at 46. All such wrongs must be addressed by the corporation and in the corporate name. *Id.* at 45.

Here, as in *Ninneman*, Respondents should not be able to sue on a corporate claim. Respondents admit that “by the time this action was brought before the Court, the corporate entities had long ago been dissolved.” RB 20. No evidence was presented at trial to establish Mr. Shim had a right to sue on behalf of the corporation or had standing to sue on behalf of the corporation. At the close of the Respondent’s case in chief, the trial court was left wondering “did he succeed to the assets of the corporation?” RP 171.

Therefore, Mr. Shim should not be able to sue in his individual capacity for alleged wrongs committed against College Mart, and the claim against the Appellants in the amount of \$521,707.40 should not have been included in the award amount calculations. Under the same law, the check from Hanmi Law Offices to Wenatchee Group Inc. for \$56,076.20 should also not have been included in the award calculations.

6. Exhibits 20 and 23 Should Not Have Been Part of the Recovery Calculation.

Mr. Shim should not be allowed to benefit from his failure to provide the original Key Bank checks. At trial, Mr. Shim introduced

Exhibits 20 and 23 which are two blank checks from Key Bank. RP 34-35, 38-39. Mr. Shim had considerable time prior to trial to request documentation from his bank regarding the amount of these checks, but he never did so. If evidence establishing the values of the checks existed, it would have been readily available to Mr. Shim. Without the original checks, there is no evidence as to the amount of the checks, whether the checks were cashed, and to whom payment was made if they were cashed. The only evidence provided at trial was that someone began to fill out checks. Even the trial court noted that Exhibit 20 had no dollar amount complete. Without evidence establishing a dollar amount or who the check was written to, there is insufficient evidence to meet the Respondents' burden.

Further, Respondents' brief is inaccurate in its arguments regarding the two checks. RB 21-23. Respondents state that the second check was admitted because the trial court was able to read the dollar amount and the payee. RB 22; RP 37. That statement was in reference to Exhibit 21, not Exhibit 23 which is the second blank check. As to Exhibit 23, the trial court actually said, "23 is admitted subject to testimony by Mr. Pak. Because I don't, there may be a way to visualize the amount but I'm not visualizing it

right now.” RP 39. The trial court was unable to determine what the amount of the check was or who it was made out to. Also, the check was clearly admitted conditionally despite the assertions in Respondents’ brief. *Id.*; RB 22-23.

Respondents also contend that the series of four checks, Exhibits 20, 21, 22, and 23 were all “issued in the same amount, to the same payee.” RB 22. However, Exhibit 22 is clearly made out to “Dominic Ho Shim” which is contrary to the allegations that all of the checks were issued to Mr. Pak. Also, the amount on the check is \$79,880.01. Exhibit 22. Exhibit 21 contained a different amount, which Mr. Shim testified was \$79,890.01. RP 36. Additionally, Exhibit 21 is made out to “Hyon Pak.” Respondents’ assertion that the four checks were all “issued in the same amount, to the same payee” is not supported by the evidence. Finally, the language quoted in Respondents’ brief from the back of Exhibit 21 is not on one of the checks in dispute, so it is irrelevant. For all the reasons stated above, the Respondents failed to meet their burden to establish the amount and payee for Exhibits 20 and 23. Therefore, these checks should not be included in the total assessment against Mr. Pak.

7. Motion for Reconsideration

In cases pertaining to contracts or for the injury or detention of property, a verdict may be vacated and reconsideration granted if an error has been made in the assessment of the amount of recovery. CR 59(a)(6). For all of the reasons cited above, as well as in the original brief, an error was made in the assessment of the amount of recovery. Respondents repeatedly failed to provide documentation for their claims and to prove the true intent of the parties in the myriad of transactions. The trial court erred in denying the Appellant's Motion for Reconsideration and the ruling should be reversed.

II. CONCLUSION

This Court should reverse the trial court and dismiss this case because Respondents failed to meet their burden at trial. In the alternative, the trial court erred in its Findings of Fact and Conclusions of Law and Judgment recovery calculations and by denying the Appellants' Motion for Reconsideration. This Court should remand with an order that the trial court strike the unsupported findings and conclusions and reverse the judgment in favor of Appellants. The recovery amount should be recalculated to reflect the striking of the unsupported findings.

Dated this 2<sup>nd</sup> day of January 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Russell M. Aoki", written over a horizontal line.

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

DOMINIC SHIM,	)	
	)	No. 68636-4-I
Respondent,	)	
	)	
v.	)	
	)	
HYON PAK et. al.,	)	CERTIFICATE OF SERVICE
	)	
Appellants,	)	
	)	

I certify that on the 2<sup>nd</sup> day of January, 2013, I caused one original and one copy of the Reply Brief of Appellant to be sent to the following in the manner indicated below:

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