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NO. 68928-2

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

(Skagit County Cause No. 10-4-00138-7)

**IN RE THE ESTATE OF LYDE L. HERRLE,
CONNIE MARICH and THOMAS MARICH,**

Appellants,

vs.

**JOHN LEE, personal Representative to the Estate and
Trustee of the Lyde L. Herrle Trust,**

Respondent.

APPELLANTS MARICHS' REPLY BRIEF

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF THE CASE.....	3
III.	LEGAL ARGUMENT AND AUTHORITY	5
	A. Actual Authority of Kamb	5
	B. Apparent Authority of Kamb	6
	C. The Estate’s Check Issued to Connie Marich Was an Unconditional Promise.....	11
	D. Kunferman Ratified the Agreement with Marichs	13
	E. The Circumstantial Evidence and Reasonable Inferences Support the Marichs’ Agreement with the Estate	14
IV.	CONCLUSION	16

TABLE OF AUTHORITIES

Washington Supreme Court

<i>Eatonville State Bank v. Marshall</i> , 170 Wash. 503, 17 P.2d 14 (1932)	7
<i>Hansen v. Friend</i> , 118 Wn.2d 476, 824 P.2d 483 (1992).....	14-15
<i>Hutson v. Walker</i> , 37 Wn.2d 12, 221 P.2d 506 (1950).....	7
<i>King v. Riveland</i> , 125 Wn.2d 500, 886 P.2d 160 (1994).....	6
<i>Kozak v. Fairway Finance-Seattle, Inc.</i> , 60 Wn.2d 500, 374 P.2d 1011 (1962).....	7
<i>Lamb v. General Associates, Inc.</i> , 60 Wn.2d 623, 374 P.2d 677 (1962).....	7
<i>Mohr v. Grantham</i> , 172 Wn.2d 844, 262 P.3d 490 (2011).....	6, 10-11
<i>Richardson v. Seattle-First National Bank</i> , 38 Wn.2d 314, 229 P.2d 341 (1951).....	7

Washington State Court of Appeals

<i>Bergin v. Thomas</i> , 30 Wn.App. 967, 638 P.2d 621 (1981).....	7
<i>Chicago Title Ins. Co. v. Washington State Office of Ins. Comm’r</i> , 166 Wn. App. 844, 271 P.3d 373 (2012).....	6

Thola v. Henschell, 140 Wn.App. 70,
164 P.3d 524 (2007)..... 13, 14

Statutes

RCW 62A.3-104(a)..... 11-12
RCW 62A.3-104(f) 12
RCW 62A.3-104(c)..... 12
RCW 62A.3-106..... 12, 13
RCW 62A.3-106(a)..... 12

I – INTRODUCTION

Connie Marich was the niece of Lyde Herrle (Herrle). CP 542. Thomas and Connie Marich (Marichs) believed, in 2008, they had an enforceable agreement with Herrle to buy his farm for \$100,000. CP 541. Believing this, Marichs paid Herrle \$10,000 as a down payment on the agreed \$100,000 purchase price. CP 570. The check referenced a \$10,000 down payment on the farm, with the balance of \$90,000 to be paid to the Estate. *Id.* After Marichs paid Herrle \$10,000, Herrle executed a document wherein he instructed his Estate to sell his \$350,000 farm to Connie and Thomas Marich for \$100,000. CP 35; CP 38.

On February 9, 2010, Kenneth Jungquist (Jungquist) offered to buy Herrle's farm for \$355,000. CP 150; CP 156. Herrle died on February 23, 2010, at the age of 96. CP 7; 74-75. Recognizing the Estate had an opportunity to sell the farm for \$355,000 instead of \$100,000, negotiations began with Marichs. Marie Kunferman (Kunferman), the sister of Herrle, was appointed as the Personal Representative and given non-intervention powers. CP 6; 80-88. Kunferman hired attorney Marie Kamb (Kamb) to assist her in the

administration of the Estate. CP 282, ¶ 14. On April 15, 2010, Connie Marich was offered and accepted a \$150,000 distribution from the Estate in full settlement of all her claims against the Estate. CP 222, ¶ 3; CP 224-25; CP 227; CP 543, ¶ 14.

On April 20, 2010, the Estate sold Herrle's house and farm to Mr. Jungquist. CP 282, ¶ 15. Potentially, the Estate gained \$100,000 by the settlement. *Id.* On June 10, 2010, Thomas and Connie Marich purchased their home, located at 1483 Barrell Springs Road, Bellingham, Washington, 98229, for \$351,100. CP 279.

Kunferman resigned as the Personal Representative of the Estate and Trustee of the Trust on April 18, 2011. CP 666, ¶ 2. At no time while she served as the Personal Representative or Trustee, did Kunferman claim an interest in the Marichs' home or the \$150,000 distribution to the Connie Marich. The Estate filed its first unverified Petition to Quiet Title on July 7, 2011, over a year after Connie Marich accepted \$150,000 from the Estate in full settlement of her claims. CP 527-31.

II – STATEMENT OF CASE

In April of 2010, Tom and Connie Marich (Marichs) understood and believed, correctly, that Marie Kunferman (Kunferman) was the Personal Representative of the Estate. CP 604, ¶ 3; CP 280, ¶ 1; CP 281, ¶ 12. Kunferman hired attorney Rosemary Kamb (Kamb) to assist her in administering the Estate of Lyde L. Herrle (Estate). CP 282, ¶ 14. Marichs met with Kamb at least three times, based on conversations with Kunferman. CP 543, ¶ 13; CP 604. Marichs understood and believed that Kunferman had given Kamb authority to negotiate a settlement of their claims against the Estate. CP 604.

Kamb, on behalf of the Estate, offered Connie Marich \$150,000 in full settlement of all her claims against the Estate. CP 543, ¶ 14. Connie Marich accepted the offer. *Id.* From conversations with Kunferman, Thomas Marich understood and believed that Kunferman knew of the settlement and approved the settlement reached. CP 604. Kamb prepared a "Full and Final Distribution and Receipt of Heir" for Connie Marich's signature. CP 543, ¶ 15; CP 572. In April of 2010, Connie Marich signed the "Full

and Final Distribution and Receipt of Heir" believing and understanding that the \$150,000 belonged to her and that she no longer had any claim against the Estate. CP 543-44, ¶ 15; CP 572.

In April of 2010, two Cashier's Checks, check #496769 in the sum of \$40,000 dated 04/27/10 and check #496068 in the sum of \$100,000 dated 04/14/10, remitted by the Estate and signed by Kunferman as personal representative of the Estate, issued unconditionally to Connie Marich and signed by Kunferman, were delivered to and cashed by Connie Marich. CP 222, ¶ 3; CP 224-25. Earlier, a cashier's check payable to Connie Marich, check #5479501002 dated 03/29/10 in the sum of \$10,000, also signed by Kunferman, was delivered to and cashed by Connie Marich. CP 222, ¶ 4; CP 227.

Kamb was suspended from the practice of law by the Washington State Bar association on March 9, 2010. CP 281, ¶ 9.

Kunferman's Declarations admit the following:

I paid \$10,000 to Ms. Kamb for assisting me in preparation of the probate pleadings and helping me in administering the Estate. I did not know that Ms. Kamb was suspended from practicing law until months later. CP 282, ¶ 14; and

I too was a client of Ms. Kamb and trusted her. CP 284, ¶ 28.

Kunferman does not deny instructing Marichs to speak with Kamb regarding the Estate. CP 666-67; CP 280-84. Kunferman only denies instructing Connie Marich to discuss the "Second Amendment to the Lyde L. Herrle Trust." CP 667, ¶ 7. The Estate admits that Kunferman, at all times when acting as Personal Representative, including the times she signed and issued the three checks to Connie Marich, acted with nonintervention powers.

III – LEGAL ARGUMENT AND AUTHORITY

A. Actual Authority of Kamb

Despite Kunferman's admissions that she hired Kamb to administer the Estate and trusted Kamb, the Estate denies that Kamb had actual authority to enter into any agreement with Thomas and Connie Marich with regard to the Estate. CP 284, ¶ 28; CP 282, ¶ 14. In her Declaration dated August, 16, 2011, Marie Kunferman stated, "I did not, at any time, authorize Rosemary Kamb to enter into any agreement with Thomas and Connie Marich with regard to any transaction on behalf of the

Estate.” CP 667, ¶ 8. Assuming Kamb did not have actual authority to act on behalf of the Estate, Kamb clearly had apparent authority.

B. Apparent Authority of Kamb

“[An] agent . . . binds a principal . . . if objective manifestations of the principal ‘cause the one claiming apparent authority to actually, or subjectively, believe that the agent has authority to act for the principal’ and such belief is objectively reasonable.” *Mohr v. Grantham*, 172 Wn.2d 844, 860, 262 P.3d 490 (2011); *quoting King v. Riveland*, 125 Wn.2d 500, 507, 886 P.2d 160 (1994).

The apparent authority doctrine protects third parties who justifiably rely upon the belief that another is the principal's agent. The doctrine has three basic requirements: (1) The putative principal's actions must lead a reasonable third party to conclude that the actors are employees or agents; (2) the innocent third party must believe they are agents; and (3) the third party must rely on that mistaken belief to its detriment. The innocent third party's subjective belief must be objectively reasonable based on the principal's specific objective manifestation.

Chicago Title Ins. Co. v. Washington State Office of Ins. Comm'r,
166 Wn. App. 844, 857, 271 P.3d 373 (Div. 2, 2012) (Citations
omitted).

Facts and circumstances are sufficient to establish
apparent authority only when a person exercising
ordinary prudence, acting in good faith and conversant
with business practices and customs, would be misled
thereby, and such person has given due regard to such
other circumstances as would cause a person of ordinary
prudence to make further inquiry.

Bergin v. Thomas, 30 Wn.App. 967, 971, 638 P.2d 621 (1981);
quoting *Lamb v. General Associates, Inc.*, 60 Wash.2d 623, 627-28,
374 P.2d 677 (1962).

Assuming no actual authority, the Estate's claims should be
directed against Kamb and/or Kunferman. "[W]here one of two
innocent parties must suffer from the wrongful act of another, the
loss should fall on the one who created the circumstances which
enabled the third party to perpetrate the wrong." *Hutson v.*
Walker, 37 Wn.2d 12, 18, 221 P.2d 506 (1950) *reversed on other*
grounds in Richardson v. Seattle-First National Bank, 38 Wn.2d
314, 229 P.2d 341 (1951); *see also Kozak v. Fairway Finance-*
Seattle, Inc., 60 Wn.2d 500, 504, 374 P.2d 1011 (1962); *Bergin v.*

Thomas, 30 Wn.App. 967, 971, 638 P.2d 621 (1981); *Eatonville State Bank v. Marshall*, 170 Wash. 503, 505, 17 P.2d 14 (1932).

Relying primarily on the fact that Kamb was suspended from the practice of law on March 9, 2010, the Estate argues that Kamb did not have authority to settle any claims for the Estate. However, without a supporting declaration, the Estate also argues that the Receipt of Heir, prepared by Kamb after she was suspended from the practice of law, demonstrates an imaginary intent by the Estate to form a joint tenancy with Marichs in an unidentified, improved parcel of real estate. The Estate apparently believes it can argue that Kamb had no authority to negotiate a settlement, after suspension, but did have authority to draft legal documents on behalf of the Estate after suspension. The Receipt of Heir, prepared by Kamb and signed by Connie Marich, does not contain any language supporting the Estate's argument, does not reference any trust amendments, and does not contain any condition precedent or subsequent.

The Estate relies on the August 16, 2011 Declaration of Marie Kunferman. In this declaration, Kunferman states that she

“did not, at any time, authorize Rosemary Kamb to enter into any agreement with Thomas and Connie Marich with regard to any transaction on behalf of the Estate.” CP 667, ¶ 8. However, Kunferman also states in her Declarations that she hired Kamb to assist her with the administration of the Estate; that she trusted Kamb; and that she did not know Kamb had been suspended from the practice of law until months after the fact. CP 284, ¶ 28; CP 282, ¶ 14.

More importantly, Kunferman, in her declarations, does not deny the conversations with Thomas and Connie Marich, as contained in their declarations. Kunferman does not deny that she instructed both to speak with Kamb regarding their claims with the Estate. Kunferman told Connie Marich to discuss her concerns and claims with Kamb. CP 543, ¶ 11. Because Kunferman does not deny the conversations with Marichs, it was reasonable and appropriate for Thomas and Connie Marich to believe Kamb had authority and was acting on behalf of Estate when Connie Marich settled her claims against the Estate. *Id.*, ¶ 13.

The conversations with Ms. Kamb occurred as a result of my understanding from conversations with Marie Kunferman that I should discuss my wife and mine concerns, claims, and settlement with the estate or trust with Ms. Kamb. From my conversations with Ms. Kunferman, I understood and believed that she knew of and approved the settlement documents prepared by Ms. Kamb. The checks we received, pursuant to the settlement, were signed by Ms. Kunferman.

CP 604, ¶ 2, Dec. of Thomas Marich.

Kunferman did not deny that she instructed Thomas and Connie Marich to speak with Kamb regarding the Estate. She denied that she instructed Connie Marich to discuss the "Second Amendment to the Lyde L. Herrle Trust" with Kamb. CP 667, ¶ 7. Connie Marich never claimed that she was instructed to discuss the Second Amendment with anyone. She was directed to discuss her claims against the Estate and was asked how much money she wanted to go away. No declaration filed by the Estate deny these conversations or the negotiations which followed the instructions.

Kamb had apparent authority and therefore bound the Estate. Kunferman's words and conduct caused Marichs to reasonably believe that Kamb and Kunferman had authority, and Marichs reasonably believed in the authority of both. Therefore,

apparent authority existed. *Mohr v. Grantham*, 172 Wn.2d 844, 860, 262 P.3d 490 (2011).

C. The Estate's Check Issued to Connie Marich Was an Unconditional Promise

After the conversations with Kamb and the preparation of a form document that contained no conditions, the Estate issued and Kunferman signed three negotiable instruments and delivered them to Connie Marich. Similar to the Kamb conversations and document, the checks contained no conditions. As a matter of law the checks were unconditional promises by the Estate to pay the \$150,000.00.

'[N]egotiable instrument' means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

(1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;

(2) Is payable on demand or at a definite time; and

(3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to

confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor. . . .”

RCW 62A.3-104(a). “‘Check’ means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank” RCW 62A.3-104(f). “An order that meets all of the requirements of subsection (a), except subsection (a)(1), and otherwise falls within the definition of “check” in subsection (f) is a negotiable instrument and a check.” RCW 62A.3-104(c).

Absent any express language creating a condition of payment, a check is unconditional. RCW 62A.3-106.

Except as provided in this section, for the purposes of RCW ~~62A.3-104(a)~~, a promise or order is unconditional unless it states (i) an express condition to payment, (ii) that the promise or order is subject to or governed by another writing, or (iii) that rights or obligations with respect to the promise or order are stated in another writing. A reference to another writing does not of itself make the promise or order conditional.

RCW 62A.3-106(a).

None of the three checks contained any “express condition to payment.” CP 224; 225; 227. Nor did the checks reference the Receipt of Heir signed by Connie Marich or any Trust documents.

Had the Estate intended to retain an interest for the Trust in the \$150,000 or conditioned its use upon the purchase of real property, Washington law required that the checks issued to Connie Marich contain such a condition or that the Receipt of Heir would contain such a condition. Absent any "express condition to payment," the checks issued to Connie Marich are unconditional. RCW 62A.3-106.

D. Kunferman Ratified the Agreement with Marichs

After Marichs negotiated the checks, the Estate was free to administer the probate, free of any potential litigation with Marich. The Estate obviously was happy with the agreement negotiated by Kamb or it would not have issued the three checks.

"Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.

Even if an agent acts without her principal's authority, the principal may nevertheless ratify the agent's act by *acting with full knowledge of the act, accepting the benefits of the act* or intentionally assuming the obligation imposed without inquiry. Actual or constructive knowledge of the act will suffice to support a determination of ratification."

Thola v. Henschell, 140 Wn.App. 70, 86, 164 P.3d 524 (Div. 2, 2007). The Estate ratified the settlement, when it accepted the benefit of Kamb's actions "with full knowledge of that act's material facts." *Id.* The Estate has provided no declaration from Kamb or Kunferman which suggests that the Estate did not benefit from this settlement. Instead the Estate waited more than two years, after it was likely too late to file a claim or start litigation, in an attempt to reclaim the unconditional funds.

Kunferman, as the personal representative of the Estate, signed the checks issued to Connie Marich. CP 224; 225; 227. By signing the checks, Kunferman ratified the settlement agreement reached between Connie Marich and Estate. The checks contain no language creating any conditions on the payment to Connie Marich. *Id.* The checks do not reference any other documents, including the Receipt of Heir or the Trust documents. *Id.*

E. The Circumstantial Evidence and Reasonable Inferences Support the Marichs' Agreement with the Estate

A court will grant summary judgment only when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Wilson*

v. Steinbach, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982). **The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party.** *Wilson*, at 437. The motion will be granted only if reasonable persons could reach only one conclusion from all of the evidence. *Wilson*, at 437.

Hansen v. Friend, 118 Wn.2d 476, 485, 824 P.2d 483 (1992)

(Emphasis added).

When viewing all the evidence in the matter, the only reasonable conclusion that can be drawn is that the Marichs accepted the \$150,000 from the Estate without any conditions. It is unreasonable, more than two years later, to find an unstated intention or agreement that the money be used to purchase a home in which the Trust would retain a proportionate interest. The checks issued to Connie Marich from the Estate did not contain any conditions. CP 224; 225; 227. The Marichs did not use the \$150,000 from the Estate to purchase their home located at Barrel Springs Road. The Trust's name was never put on the title of Marichs' home. The Estate has made no payment or offer of payment on any mortgage on the house.

To the contrary, the Estate gave money to Connie Marich, without any stated condition. The Estate allowed her to spend the money as she deemed appropriate. Kunferman is removed or resigns. A new Personal Representative is appointed. That Personal Representative, a complete stranger to the transaction, waits three (3) additional months, during which time there is no offer to pay its imaginary share of the monthly mortgage payment being made by Marichs. Then, 24 months after the transaction, out of whole cloth, the stranger to the transactions invents a completely unsupported and unverified series of events. The Marichs owned their home for over one year before the Estate brought this action to Quiet Title in the Marichs' home. At no time while Kunferman was the Personal Representative of the Estate, did the Estate ask or attempt to have the Trust added to the title to Marichs' home.

IV – CONCLUSION

Assuming Kamb acted without authority, assuming Kunferman breached her fiduciary duty to the Estate, and assuming the Estate was damaged by wrongful acts of either Kamb or

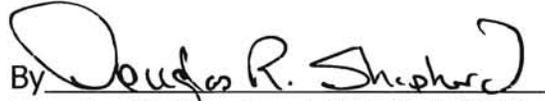
Kunferman, the Estate's claim is against Kamb and/or Kunferman not Marichs. However, none of the above assumptions are established by undisputed issues of material fact.

What is established by undisputed material facts is that Thomas and Connie Marich believed they had a substantial claim against the Estate, advised Kunferman of their belief, and were instructed by Kunferman to deal with Kamb. After reaching an agreement with Kamb, which they reasonably believed was authorized by Kunferman, Connie Marich signed an unconditional document promising to pay her \$150,000. Then Connie Marich received three unconditional checks from the Estate. Finally, what is not legally disputed is that Kunferman was acting with nonintervention powers.

This matter should be returned to the trial court, with instructions to enter summary judgment in favor of Marichs.

Respectfully submitted this 22nd day of January, 2013.

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