

App. Reply to Cross-Appeal

NO. 35504-3-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

JAMES JOHANNES, JANE DOE JOHANNES, and the
marital community composed thereof, Appellant,

v.

ESTATE OF EVELYN C. JOHANNES, Gerald Johannes,
Personal Representative, Respondents,

and

SHERRY KAY FERRENTE; KATHLEEN D. YORMARK;
JEFFREY W. JOHANNES; MATTHEW S. JOHANNES; and
TIM F. JOHANNES, Cross Appellants,

and

ESTATE OF EVELYN C. JOHANNES, GERALD
JOHANNES, Personal Representative, Cross Respondents.

**BRIEF OF APPELLANT JAMES JOHANNES IN
RESPONSE TO BRIEF OF CROSS APPELLANT**

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STATE OF WASHINGTON
DEPUTY
COURT OF APPEALS
DIVISION II

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Allard v. Pacific National Bank, 99 Wn.2d 394,
663 P.2d 104 (1983) pp. 1,2,4

In Re Estate of Jones, 152 Wn.2d 1,
100 P.3d 805 (2004). pp. 1,2,4

Statutes

RCW 11.96A.150 p. 1

I. ARGUMENT

CROSS APPELLANTS DO NOT DENY ERROR OF TRIAL COURT IN AWARDING ATTORNEY'S FEES TO THEM FROM JAMES JOHANNES

In their responsive brief the Johannes grandchildren Cross Appellants do not contest the argument by James Johannes that they did not plead a claim for attorney's fees against James Johannes or request attorney's fees against him at trial. They also do not claim that James Johannes was acting in a fiduciary capacity in any way in the estate of his mother making attorney's fees available under Allard v. Pacific National Bank, 99 Wn.2d 394, 663 P.2d 1104 or under Estate of Jones, 152 Wn.2d 1, 100 P.3d 805 (104). Since the Johannes grandchildren did not make any claim against James Johannes either in their pleadings or orally at trial, it was error for the trial court to award fees in their favor against James Johannes.

Even if the Johannes grandchildren had made a claim for attorney's fees against James Johannes under RCW 11.96A.150, Allard, *supra*, and Estate of Jones, *supra*, mandate that Gerald Johannes pay all of the attorney's fees of both James Johannes and the Johannes grandchildren based upon his breaches of fiduciary duty and it was error to require James Johannes to pay any of those fees. The trial court found, and Gerald

Johannes does not contest on appeal that he committed four serious breaches of fiduciary duty by (1) failing to keep records of the transactions he managed for the estate (FF 50, CL 2); and (2) purchasing Kmart junk bonds with 50% of the estate assets (FF 46, CL 3); and (3) failing to close the estate before 1995 (CL 4); and (4) loaning money to himself to buy a home and paying back less than the full principle balance without interest (CL 5). The trial court awarded damages of \$124,512.34 for breaches (2) and (4). The trial court also found that the breach of fiduciary duty by Gerald Johannes in failing to keep adequate records made it impossible to prove the disposition of estate funds and on that basis found a breach of fiduciary duty but denied damages because the lack of records made it impossible to determine where the missing funds went (FF 50). Based on the trial court's unchallenged findings that Gerald Johannes committed four serious breaches of fiduciary duty which mandated his removal as Personal Representative it was legal error for the trail court to require James Johannes to pay any attorney's fees to the Johannes grandchildren. Allard, *supra*, specifically holds that where a trustee unsuccessfully defends a claim for a breach of fiduciary duty he personally must pay all of the reasonable attorney's fees incurred by the parties alleging a breach. Estate of Jones, *supra*, extends the same rule to Personal Representatives.

Here, both James Johannes and the Johannes grandchildren sued Gerald Johannes alleging a breach of fiduciary duty. James Johannes took the lead in the case and proved that Gerald Johannes breached his fiduciary duties by buying Kmart junk bonds which lost \$84,000.00 of principle, by using estate funds to purchase his home and not paying them back in full and by not paying interest, by failing to keep adequate records, and by failing to timely close the estate. The discovery done by James Johannes uncovered for the first time the breach of Gerald Johannes in buying the Kmart junk bonds. It is not disputed that the Kmart junk bonds were first learned of by any of the trust beneficiaries when counsel for James Johannes took the deposition of Gerald Johannes in the discovery phase of this case. At trial Gerald Johannes admitted that to be true, stating:

Q Okay. Now, you never mentioned to your brother anything about the Kmart bond losses at any time prior to your deposition, did you?

A I don't think we had the conversation.

Q Okay. And you didn't tell any of the other beneficiaries of the trust that you had lost that money?

A I don't characterize it as I lost the money. I characterize it as I got the money back, less some expenses. I worked for a year hard on getting the money back.

Q You didn't tell – in fact, it came out that that had happened the first time at your deposition, isn't that true, that your brother or I knew about it?

A This estate account is an open book. Anybody can look at it whenever they want. It did come out at the deposition.

Q And your brother had never known about it before that time?

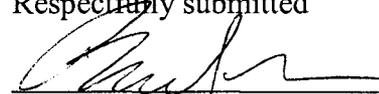
A I guess not.

Since the litigation in which James Johannes took the lead exposed the breaches of fiduciary duty by Gerald Johannes, as a matter of law it was error for the trial court to require James Johannes to pay any of the attorney's fees for the Johannes grandchildren because both Allard, *supra*, and Jones, *supra*, require that all of those fees be paid by the fiduciary whose breaches of fiduciary duty were exposed in the litigation. This court should reverse the award of attorney's fees against James Johannes in favor of the Johannes grandchildren and as has previously been argued in the opening brief of James Johannes, and require Gerald Johannes to pay all of the fees of the Johannes grandchildren.

II. CONCLUSION

The Johannes grandchildren do not contest that it was error for the trial court to award attorney's fees in their favor against James Johannes. The trial court's judgment requiring James Johannes to pay a portion of the attorney's fees for the Johannes grandchildren should be reversed.

Respectfully submitted



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**AFFIDAVIT OF MAILING BRIEF OF APPELLANT JAMES
JOHANNES IN RESPONSE TO BRIEF OF CROSS APPELLANT**

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Harvey Means certifies and states as follows:

I am a citizen of the United States of America, a resident of Thurston County, Washington, over the age of twenty-one (21) years and competent to be a witness in the above-entitled cause.

That on the 7th day of June, 2007, I forwarded a true and correct copy of the Brief of Appellant James Johannes in Response to Brief of Cross Appellant and Affidavit of Mailing in connection with the above-captioned matter, by ABC Legal Messengers, Inc. and by facsimile to the following addresses:

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

Dated June 7, 2007 at Tacoma, Washington



Harvey Means