

Respondent's Brief

No. 35504-3-II

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

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

Appellants,

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

Respondents,

SHERRY KAY FERRANTE, KATHLEEN D.  
YORMARK, JEFFREY W. JOHANNES,  
MATTHEW S. JOHANNES and TIM F. JOHANNES,

Cross Appellants,

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

Cross Respondents.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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BRIEF OF RESPONDENT

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**ORIGINAL**

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**A. COUNTERSTATEMENT OF THE ISSUES**

1. Does substantial evidence support the trial court's findings that James Johannes ("James") actions, entreaties and failure to repay his loan from the Estate were a significant cause of the delay in closing the Estate?
2. Did the trial court act within its discretion when it dismissed James claims against Gerald Johannes ("Jerry") for keeping those Estate assets that were not loaned to James in short-term, low risk investments?
3. Did the trial court properly determine the amount of damages to the Estate for Jerry's breach of fiduciary duty?
4. Did the trial court properly determine the amount of damages to the Estate for James' failure to repay his loan to the Estate?
5. Did the trial court properly conclude that the decedent's lifetime gifts to Jerry were properly excluded from the Estate?
6. Did the trial court act within the discretion conferred by statute by allocating attorneys' fees and costs between James and Jerry?

**B. COUNTER-STATEMENT OF THE CASE**

This case began as a collection action by the Estate of Evelyn Johannes (the "Estate") against James Johannes ("James") for an unpaid \$188,000 loan he took from the Estate in 1998. RP 29:23 - 30:18; EX.6; Appendix 2. This was the second loan James or an affiliate had taken from the Estate, the first being in the amount of \$300,000 in 1995, which had been timely re-paid. EX. 72; RP 701-704; Appendix 1. Subsequent to the filing of the Estate's collection action James file an action against his brother for failure to make the Estate productive. CP 59-60.

Evelyn Johannes ("Evelyn") died on March 26, 1989, widowed with two sons, James and Gerald Johannes ("Jerry"). EX. 10. In her Will, after two specific charitable bequests (RP 308:4-10), Evelyn left 60% of her Estate outright to Jerry and 40% of her Estate in a trust for the benefit of James ("James Trust"); the named trustee of the James Trust was Puget Sound National Bank<sup>1</sup>. EX. 7.

On April 12, 1989, probate was opened in the Pierce County Superior Court; Jerry was appointed personal representative and granted non-intervention powers. EX 10. John Hansler, the then acting attorney for James filed a request for special notice of proceedings in the Estate.

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<sup>1</sup> The Trust provided for income to be distributed to James and authorized the trustee to make discretionary principal invasions for James during his lifetime pursuant to an ascertainable standard (EX.7). If any Trust corpus was left at James' death, said corpus was to be distributed in equal shares to James' children (EX. 7).

EX 11. Excluding personal property (which was disposed-of pursuant to a separate directive), the Estate had a stated net value (after payment of estate taxes) of \$641,318. EX. 8.

Initially the Estate owned two pieces of real property, the decedent's residence (the "Residence") and a four-plex rental property (the "Four-Plex"). EX. 8; EX. 9. The Residence was sold on August 4, 1989 and the proceeds of the sale were deposited in the Estate's bank account. EX 26.

While the Estate still owned the Four-Plex, Jerry attempted to fund the James Trust. EX 20. Puget Sound National Bank would not accept a trust estate that contained realty or even a partial interest in realty. EX. 20. Jerry worked through his counsel to develop a solution to this realty issue and suggested putting the real estate in a separate trust so that the Estate could be closed. EX 20. When the trustee balked at this idea, the Estate took steps to sell the Four-Plex and finally sold it in April, 1993. EX 29.

James told Jerry that he was displeased to have his 40% inheritance burdened by a trust and wanted to leave the Estate open to explore ways to avoid the James Trust. RP 51:13-21, 416:1-6. Despite the fact that Jerry could take his 60% interest outright from the Estate at any time he agreed to James' multiple requests to leave the Estate open;

Jerry also made direct distributions of Estate proceeds to James. RP 453:5 – 23, 636:4-12. James received the benefit of ready Estate cash for his personal use and use in his business. RP 453, 455 – 457. Unlike a bank, the Estate asked for no collateral, performed no credit check, charged no loan fees and never declined to make a loan. RP 717:2-17.

In June 1995, James (through his closely held corporation “Valley Packers, Inc.”) requested and received a \$300,000 loan from the Estate; James executed a promissory note at 5% interest with no loan fees. Appendix 1; EX. 72; RP 701 – 704. This first loan was repaid. EX. 73.

After the \$300,000 note was repaid James did not want the Estate to be closed, his efforts to avoid the trust continued. RP 458:24 – 459:14.<sup>2</sup> At his brother’s request, in 1997 Jerry consulted with counsel regarding James’ options for terminating the trust. CP 463 - 464. It was determined that the trust could be terminated if the trustee and all of the children of James agreed to the termination. CP 464. Jerry relayed this information to James. CP 465.

In March 1998, James requested and received a second loan from the Estate in the amount of \$188,000. RP 706-708. This loan was made effective March 26, 1998 (the “Note”). EX. 6. The Note was a six-month

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<sup>2</sup> In January, 1995, James requested a distribution on his interest to-date in the Estate. RP 53:13-21. On January 17, 1995, the Estate made a distribution to James of \$68,000 (40%) and a pro-rata distribution to Jerry of \$102,000 (60%), leaving the total Estate with approximately \$700,000. EX 1.

Note at 8% per year due September 26, 1998. James never re-paid any amounts on the Note despite repeated assurance the Note would be re-paid. RP 483:25 – 484:2, 485. While the loan was in default, James continued to work to avoid the trust; he encouraged Jerry to make high risk investments with Estate funds by recommending that Jerry invest in high-tech stocks. RP 692:15 – 693:18. James was even made an authorized investor on the Estate's investment account at McDonald Investments. EX. 102, RP 476 - 478.

Throughout the existence of the Estate from 1989 and into 2001, James and Jerry saw each other on a regular basis. RP 658:2-13. They both worked at family businesses located in adjoining buildings, James' office was across the alley from Jerry's. RP 488 – 491, 658. Up until 1993, they also jointly-owned a fourplex together that was adjacent to the Estate's Four-Plex. RP 678:16-24.

In 2003, while waiting for James to pay the Note back so that the Estate could be closed, the Estate had to file a NASD securities arbitration against the Estate's investment advisor Steve Beck and McDonald Investments. EX 101. Beck advised the investment of \$297,000 in Estate assets in K-mart bonds, which after the bankruptcy of K-mart, were valued at \$30,000. EX 101. Through the NASD securities arbitration, the Estate was awarded \$304,603 against Beck and McDonald Investments, which

was paid in cash and securities. EX 101. In their findings, the NASD arbitration panel found that Beck and McDonald Investments were negligent in recommending the bonds to Jerry as an appropriate investment. EX 101. Transaction costs were generated by the arbitration, the cost of attorney's and expert witness fees reduced the amount of the award. EX 3. After the recovery, the total loss to the Estate was limited to \$82,000, which represented attorney fees and expert witness fees. EX. 3.

The Estate filed this action to collect on James' Note on July 29, 2004. CP 1-5. In response James filed an action for "breach of fiduciary duty for failing to make the estate productive" on August 20, 2004. CP 59-60. The two actions were consolidated on October 22, 2004. CP 6-7. Subsequently, James' children, as contingent beneficiaries of the James Trust, intervened. CP 8-13. At no time in this proceeding did James or his children request an accounting nor did they file a motion to remove Jerry as personal representative. RP 688. The sole complaint in this action was for breach of fiduciary duty by failure to make the Estate productive. CP 59-60.

This case was tried before the Honorable Frederick B. Hayes, Judge Pro-Tempore. After four days of testimony and argument, followed by supplemental argument and briefing, the Court entered findings of fact

and conclusions of law. The Court also provided a memorandum decision synthesizing the various rulings relevant to this appeal. CP 94-98. The trial court awarded full judgment plus attorneys' fees in favor of the Estate against James for default in payment of the Note. The court entered two judgments against Jerry: the first in the amount of \$27,076.80 in favor of James' children for half of their attorneys fees and costs, and the second in the amount of \$169,622.82 in favor of the Estate for breach of fiduciary duty, itemized as follows:

- (a) \$84,000.00 for the un-reimbursed attorney's fees and costs on the Estate's K-mart bonds' arbitration action;
- (b) \$4,000.00 for disgorgement of the personal representative's fee;
- (c) \$895.70 plus interest related to a loan made by the Estate to Jerry in July, 1998<sup>3</sup>;
- (d) \$13,769.00 plus interest from 1989 related to an entry on the Estate's IRS form 706 (estate tax return) which stated that there was a loan balance owed by Jerry to the Estate;
- (e) \$45,050.48 for attorney's fees and costs; and
- (f) \$21,907.64 in interest.

RP 957 – 961.

The trial court specifically determined that James was not entitled to damages, that James should repay his Note with interest and that James

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<sup>3</sup> The court assessed \$5,049.86 against Jerry finding that Jerry borrowed \$240,000 from the Estate on July 17, 1998 and repaid \$239,104.30 on October 21, 1998, which was for some reason \$895.70 less than the amount borrowed; the award includes interest.

should pay one half of the Estate's attorneys fees. CL 1, 12, 15. The court specifically found that it resolved any credibility issues in favor of Jerry against James. FF 55.

C. **ARGUMENT**

(1) **Standard of Review.**

Findings of fact are reviewed under the clearly erroneous standard to determine whether they are supported by substantial evidence. Miller v. City of Tacoma, 138 Wn.2d 318, 323, 979 P.2d 429 (1999). Unchallenged findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). The court reviews the conclusions of law de novo. Bishop v. Miche, 137 Wn.2d 518, 523 973 P.2d 465 (1999). Trial court rulings on decisions to admit evidence are reviewed under the manifest abuse of discretion standard. Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997).

(2) **The Court Correctly Analyzed the Duty to Close the Estate.**

It is apparent that the court believed the substantial evidence presented at trial that the delay in closing probate was largely attributable to the actions, requests and entreaties of James. James not only consented to the prolonged administration of the Estate, he was an active participant in ensuring that the Estate could not be closed. FF 29, 35, 37, 39, 41.

James took steps to avoid the James Trust, took distributions from the Estate, made investment recommendations for Estate assets and borrowed money from the Estate on two occasions – the second time he refused to repay the funds he had borrowed. FF 34, 35, 38, 39, 42. In effect, the Estate acted as a private bank for James, with a banker that asked for no security, performed no credit checks and never turned down a loan request. RP 717:2-17.

It has long been held that “all persons who knowingly participate in or aid in committing a breach of trust are responsible for the wrong, and may be compelled to replace the funds which they had been instrumental in diverting.” Locke v. Andrasko, 178 Wn. 145, 153, 34 P.2d 444 (1934) *citing*, Duckett v. National Mechanics' Bank, 86 Md. 400, 38 Atl. 983, 39 L.R.A. 84, 63 Am. St. 513. That equitable principle is applicable here, as James participated knowingly in the prolonging of administration and actively sought loans that were preclusive of closing the Estate. To the extent that this caused any damage, James is equally responsible for it.

Substantial evidence supports the court’s factual determination that the Estate could not close prior to 1995. The record clearly indicates that for the first four years of administration, the Estate held realty which created issues that prevented the Estate from being closed without a loss to the beneficiaries. Contrary legal conclusions put forth by James’s experts

were properly disregarded by the court. ER 704(b). When the Estate realty finally could be sold without a loss there were additional issues to resolve before the Estate could be closed.

Because the Estate sold its real property in 1993 with a gain in excess of basis there was a need to keep the Estate open through 1994 to file income tax returns. EX 61. As the exhibit clearly shows, additional time to file was granted by the Internal Revenue Service so the personal representative could obtain all of the necessary documents to file a tax return. The return wasn't completed by the Estate's accountant until October 14, 1994. It is also noteworthy that closing the Estate at the end of 1993 would have resulted in at least a \$20,000 loss to the Estate. EX 62. The bond payment discrepancies described in exhibit 62 were not fully resolved until January, 1995.

Putting aside the potential loss to the Estate by closing in 1993 or 1994, the Estate would not have been fully liquid until the end of 1994. This fact is supported by the distributions to James and Jerry that were made in January 1995 and further bolstered by the \$300,000.00 loan to James in July of 1995. RP 701 - 704. In light of this evidence of liquidity, the absence of earlier evidence of liquidity and the potential loss to the Estate that would have been created by closing prior to 1995 (EX.

62) the court was justified in making the factual determination that 1995 was a reasonable date by which the Estate could have been closed.

(3) **Substantial Evidence Supports the Court's Calculation of Damages.**

Substantial evidence presented at trial supports the court's calculation of the Estate's damages. James now complains that the trial court did not endorse his argument regarding lost appreciation - a hypothetical sum that could have been received had the Estate been closed at a hypothetical time. The theory that supports lost appreciation in trust management is based on an extension of the lost profits rule. Gillespie v. Seattle-First National Bank, 70 Wn. App. 150, 175, 855 P.2d 680 (1983). As the trial court properly determined, this theory is inapplicable to the evidence presented in this case. Long term time-horizon investments are not comparable to the type of investments appropriate for a lay personal representative who has a short term investment time-horizon incident to the duty to close the estate as "rapidly and quickly as possible."

Gillespie was awarded damages for lost appreciation by showing that the performance of a comparable trustee managed real estate investment exceeded the performance of the investment by Gillespie's trustee. In order to receive lost profits, comparable performance must be

shown. In this case, there is no comparable trustee investment that was shown, rather James relies on speculation.

Inapposite to his claim that the Executor should have closed the Estate earlier, James attempted to convince the court it was a breach of duty by Jerry to not invest the Estate assets in long time horizon (high risk) investments. To support this theory, James produced testimony of Rick Wyman, as to potential long-term investment strategies. This witness was not a commercial fiduciary and did not rely on any records from any bank trust department as part of his testimony or the model he developed, not even Puget Sound National Bank the named trustee in the will. RP 271:14-18.

The model proposed by James was further flawed as it failed to distinguish between income and appreciation or reflect the effect of distributions and taxes, thus artificially inflating its assumed appreciation. RP 272:17-20. The James Trust would have been required to pay the income to James and likely principal as well. James testified that one of the reasons he could not pay the Note back was because he did not have the money so the best evidence is that the James Trust, had it been funded, would actually have been consumed by James. RP 708:19-23, 710:16-18, 712:22 – 713:6.

The model proposed by James is fundamentally inconsistent with the legal duty of a personal representative to close probate quickly. The model presents high risks for investors with time horizons of less than ten years. RP 275:10-21. The trial court was entitled to disregard this witness and his model as unreliable and inapplicable to this Estate.

For James to argue that Jerry's experts acquiesced in the proposed model being the most likely course of investment is a misrepresentation. RP 610-612. In fact, it was merely acknowledged that the proposed funding was one of the infinite numbers of funding options that could have been pursued by a trustee with a long term time horizon – there was no specific opinion from Jerry's experts as to whether the method proposed by James' witness would actually have been adopted in this case. RP 618. There was no competent evidence at trial that Puget Sound National Bank would have invested the James Trust in the manner proposed by James.

In fact, there was no direct evidence from any commercial trustee as to how the James Trust would have been invested, had it been funded at any given time during administration. The trial court even questioned James' witness directly regarding the applicability of his model to the income payment requirements stated in the James Trust – at which point James' witness acknowledged that the rate of growth in his model would not reflect growth that would be expected from a trust that had to pay out net

income. VP 277:23 -278:8. Given the lack of evidence regarding actual funding by Puget Sound National Bank, the trial court was free to disregard the speculation of James.

Even assuming that the arguments advanced at trial were more than mere speculation, James' direct participation in the prolonging of the Estate by request, investment recommendations, borrowing and failure to re-pay the Note estop him from now making any claim for breach of duty. *See, In re Ennis' Estate*, 96 Wn. 352, 165 P. 119, (1917) (*beneficiaries were estopped from claiming losses resulting from their agreement to allow the personal representative to carry on decedent's business for years after the estate was opened*). The authority cited by appellant to support the proposition that estoppel cannot be used against a beneficiary is inapposite to that point, it merely acknowledges that fiduciaries have duties distinct from their individual interest. *In re. Peterson's Estate*, 12 Wn.2d. 686, 123 P.2d 733 (1942). Estoppel has long been applied as a doctrine in equitable actions.

In fact, cases imposing estoppel on beneficiaries merely for past consent are common throughout the country. *Preston v. Granada Management Corporation*, 188 Mich. App. 667, 672, 470 N.W.2d 411, 414 (1991); *Brent v. Smathers*, 547 So.2d 683, 686, 14 Fla. L. Weekly 1772 (1989). In this case, James involvement in the breach of trust was

more than mere consent – it was active direction and participation, as shown by substantial evidence at trial. James asked Jerry to delay closing the Estate so that he could find a way to avoid the James Trust, he borrowed funds from the Estate - defaulted on the second loan and made high risk investment recommendations for Estate assets. To allow James to now recover in spite of his active participation would be fundamentally inequitable.

Equitable estoppel is applicable to those circumstances where there has been a statement or act that has been justifiably relied upon to the detriment of the relying party. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 19, 43 P.3d 4 (2002). Equitable estoppel is established in this case by statements and actions inconsistent with a later claim made by James; (2) Jerry's reliance on such statements; and (3) the injury that would inure to Jerry if James "is allowed to contradict or repudiate the earlier admission, act or statement." Adler v. Fred Lind Manor, 153 Wn.2d 331, 362, 103 P.3d 773 (2004). James told Jerry to prolong administration, make investments with the Estate assets, borrowed money from the Estate and defaulted on a loan he received from the Estate. FF 29, CL 12. Jerry relied on James' statements and conduct in support of his actions. FF 28. It would be manifestly inequitable to allow

James to take action to recover damages on fiduciary breaches for which he was not only a willing participant, but in some cases the instigator.

(4) **The 2001 and 2004 Accountings were Properly Admitted.**

As an initial matter, trial courts have broad discretion in ruling on evidentiary matters; trial court rulings on decisions to admit evidence are reviewed under the manifest abuse of discretion standard. Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997). It is important to note that there were two different accountings that were admitted as part of this action, at two different times.

As noted by James, the 2001 accounting (Ex. 17) was not admitted for the purpose of proving anything more than its existence, delivery to and review by James. James had stated that he would pay back the Note after receiving an Estate accounting in 2001. RP 483:25 – 484:2, 485. When questioned on the issue, James acknowledged seeing this 2001 accounting. RP 686. The court was not asked to put the 2001 accounting to any use other than to acknowledge its existence, a fact relevant to show the continued reaffirmation by James of his unpaid debt to the Estate. As it was not offered to prove the truth of any matter asserted, it was not used for an impermissible hearsay purpose. ER 801.

The 2004 accounting (Ex. 16) was filed in the probate cause on March 18, 2004. There was never any objection to it. It was admitted for many non-hearsay purposes, such as to show that an accounting had been prepared and filed without any subsequent objection.

In any event, Exhibit 16 as admitted would otherwise qualify under the business records exception to the hearsay rule. RCW 5.45.050. There was substantial testimony that the 2004 accounting was a compilation of the voluminous records of the Estate. RP 501 – 502. Jerry gathered the Estate records and provided them to the Estate's accountant Frank Johnson. RP 485. Testimony was also introduced that Mr. Johnson compiled these records into the accounting that was filed in 2004. RP 485. The records used by Mr. Johnson would otherwise be admissible and are in fact many of the same records that were admitted in this action.

Even assuming that the 2004 accounting is hearsay and is not subject to an exemption, the use of the 2004 accounting as a starting point for future Estate accounting was done at the behest of James. RP 963:19-24. As such its use is invited error. A party cannot invite error at trial, even error of constitutional magnitude, and then seek reversal on appeal as a result. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). James requested that this accounting be used as a starting point for an updated accounting to be prepared by the successor personal

representative and in doing so ratified the truth of any matter asserted therein. The invited error doctrine now precludes him from arguing against this accounting.

(5) **There is Substantial Evidence to Support Findings of Fact 6 and 16.**

Substantial evidence supports findings of fact 6 and 16. Likely the best evidence in support of findings of fact 6 and 16 can be found in Exhibit 8, the estate tax return. This return clearly lists the items on which the Estate paid tax. Likewise the inventory records the Estate assets that existed at the time of death. Findings of Fact 6 and 16 merely establish the assets held by the Estate at Evelyn's death. Even if James had brought an action for an accounting, these findings of fact would not be preclusive of requiring the personal representative to account for assets acquired subsequent to the filing of the estate tax return and inventory.

(a) **The CD.**

While the existence of the CD during 1993 is not disputed, its ultimate disposition was a material fact in dispute. There was significant testimony that the personal representative's recollection was that the proceeds of this CD were used as part of the payoff of the debt secured by the Estate's fourplex. RP 430, 431, 436. The exhibits produced indicate

that the CD was redeemed at or around the time that the Estate paid off the loan that was secured by the Four-Plex.

Even if appellant had actually brought an action for an accounting, substantial evidence supports Jerry's assertion that the CD was used to pay the Four-Plex debt. It was not clearly erroneous for the trial court to act on the facts presented and decline to enter a judgment for this CD.

(b) **United Bank.**

The demand for damages based on funds from United Bank is equally unsupported by the evidence. In fact, the exhibit cited by James shows United Bank proceeds being deposited into the Estate's account. Whether the United Bank proceeds were a separately stated item on the Estate's 706 tax return is immaterial – direct evidence exists that the funds were deposited into an Estate account. There is no evidence that these funds went to Jerry or otherwise were improperly removed from the Estate account.

(6) **Burden of Proof in Action for Breach of Fiduciary Duty.**

This is not an action for an accounting. This action started as a collection action an action for breach of fiduciary duty was later filed and consolidated into this case. James filed his action for breach of fiduciary duty after the Estate filed this action to collect on his unpaid Note. At no

time has James asked for an accounting as part of the instant action or plead a cause for breach of the duty to account. An accounting was requested by James in 2003 in the probate cause prior to initiation of the Estate's collection action. It was provided to James and filed with the court. EX 16. James raised no objection to the filed accounting.

Breach of a fiduciary duty imposes liability in tort, the proponent of a breach claim must prove (1) existence of a duty owed, (2) breach of that duty, (3) resulting injury, and (4) that the claimed breach proximately caused the injury. Micro Enhancement Intern., Inc., v. Coopers & Lybrand, 110 Wn.App. 412, 433-34, 40 P.3d 1206 (2002). As the proponent of an action for breach of fiduciary duty, James has the burden of proof on each of these issues. Austin v. U.S. Bank of Washington, 73 Wn. App. 293, 869 P.2d 404 (1994).

James has failed to prove that any injury resulted from Jerry's record keeping. James's witness Frank Ault did not testify that any funds were taken by Jerry and could not determine whether the differences in account values were due to fluctuations in asset values or missing funds, "[d]ifference may represent decline in value of an asset or funds not accounted for or both." EX. 115. In fact, Mr. Ault acknowledged that there were items in the financial statements he had missed when alleging that funds might be missing. RP 368, 374. James simply fails to

acknowledge that his witness Frank Ault made a number of errors in his analysis as illustrated during his cross-examination, calling into question any conclusion regarding missing funds. RP 336, 341, 343, 345, 348, 358, 359, 361, 368, 374. The court was correct in finding that James simply could not prove that a breach of fiduciary duty in failing to keep records resulted in compensable damages.

Even if James had asked for an accounting as part of this action, the authority he sites regarding the burden of proof is inapplicable as it relates to proving the propriety of actions alleged to be a breach of loyalty. Wilkins v. Lasater, 46 Wn. App. 766, 777, 733 P.2d 221 (1987). Wilkins provides that the burden of proving the propriety of a transaction alleged to be a breach of a duty of loyalty in an action for an accounting rests with the trustee. Even if Jerry were the trustee, there has been no allegation that he breached his duty of loyalty. Rather, James has alleged that Jerry breached his fiduciary duty by failing to make the Estate productive. CP 59-60. As proponent of a cause for breach of fiduciary duty James had the burden of proof and failed to prove that Jerry's actions resulted in compensable damages.

(7) **The Court Correctly Analyzed the Payments to Puget Sound National Bank.**

Yet again, substantial evidence supports the trial court's findings regarding the Puget Sound National Bank Notes. Jerry introduced into evidence a copy of the initial note that was secured with the fourplex. EX 23. This note had been renewed by the decedent at least twice during her lifetime. It provided for a floating rate of interest equal to .5% over the prime rate, with a floor of not less than 10.5%. While there is no direct evidence of the rate of interest during the three months in question in 1993, it was reasonable for the court to conclude that the funds paid were interest payments. There was no evidence presented at trial that these funds were paid to any party other than Puget Sound National Bank. RP 434. James' speculation that the payments were for other debts did not show that these payments went to any non-Estate debt.

(8) **Lifetime Gifts from Evelyn Johannes to Jerry.**

(a) **The Garage Property.**

During her lifetime, in the early 1980s, Evelyn gave Jerry and his family a parking garage in Tacoma. RP 316 – 317. She made this gift by deeding the property to Jerry. RP 316. It was shown at trial that Evelyn's accountant attempted to set up a promissory note arrangement whereby Evelyn would avoid gift tax on the gift of the garage. RP 319-320. This

arrangement required that the parties assume that a note existed, and Evelyn would then forgive an amount equal to the per beneficiary gift tax exclusion every year. RP 319 – 322. No note is known or believed to have ever been prepared or to have been signed. In any event, Evelyn took steps to renounce any such note through writings during her lifetime. EX 32. Such writings would have been effective to cancel any note, were it to exist. RCW 62A.3-604. This renunciation was effective to discharge the entire liability.

There no evidence that any note ever existed and James had not proven the existence of a lost-note as required by RCW 62A.3-309. The court held Jerry liable for \$13,769 plus interest as that was the amount that was listed on the Estate Tax Return and on which the Estate had to pay estate tax. The only basis on which the court could have found the existence of a note and Jerry's acknowledgement of a debt was by his signature on the Estate Tax Return. Because the 706 showed the balance at \$13,769, and that is the sole document signed by Jerry referencing that alleged indebtedness, the \$13,769 is the greatest amount on which the court could find Jerry liable.

(b) **Bearer Bonds.**

During her lifetime, Evelyn also delivered \$100,000 in bearer bonds to Jerry and his family as a gift. EX. 24. Evelyn executed a

“Statement of Gift” that identified the bonds by number and conveyed her intention to give these bearer bonds to Jerry and his family. EX. 24. This gift of bonds was reported on a gift tax return (IRS form 709) filed by Evelyn in 1988. EX. 14.

The bonds contain a registration statement that reads in relevant part:

“Each such registration shall be noted in the below blank by the Registrar, after which no transfer of the bond shall be valid unless made on the Registrar’s books by the registered holder and similarly noted in the registration blank below. **If this bond is registered as to principal it may be discharged from registration by being transferred to bearer, after which it shall be transferable by delivery but may again be registered as to principal as before.** The registration of the bond as to principal shall not restrain the negotiability of the coupons hereto attached by delivery merely.”

EX. 24 (emphasis added).

Undisputed testimony was provided at trial that Evelyn physically delivered the original bonds to Jerry<sup>4</sup> stapled to the executed statement of gift during her lifetime. RP 394. As negotiable bearer paper indorsed in blank, title of the bonds passed to Jerry. RCW 62A.3-104.

The right to enforce to commercial paper such as bearer bonds is transferred by the process of negotiation. RCW 62A.3-301. Negotiation is the transfer of possession of an instrument to a person that becomes a

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<sup>4</sup> Evelyn’s actual gift was \$70,000 to Jerry, and \$10,000 to each of Jerry’s wife and two children; for convenience, we will refer to the gift as being made to Jerry.

holder<sup>5</sup>; some instruments require indorsement in order to be negotiated. RCW 62A.3-201. An indorsement is a signature for the purpose of negotiating an instrument. RCW 62A.3-204. An indorsement that is not a “Special Indorsement” is a “Blank Indorsement.” RCW 62A.3-205.

In this case, the bonds were bearer bonds for which an indorsement was not required for negotiation. Even if indorsement were required, they were indorsed by Evelyn. The Uniform Commercial Code expressly provides that a signature on a document that is affixed to an instrument is considered to be an indorsement of that instrument. RCW 62A.3-204(a). In this case the bonds were physically stapled to a signed notarized statement of gift and thus were indorsed in blank. RCW 62A.3-204(a). To the extent they were order paper prior to the indorsement, they became via the indorsement bearer paper for which title would pass by transfer of possession. The registration statement for these bonds contemplated the conversion of a registered instrument to bearer paper through the process of negotiation.

Even if this transfer of possession was not a gift of principal the fact that interest on these bonds was bearer paper is not subject to dispute. EX 24. The instruments themselves provide that all interest due on the bonds is bearer paper and that like all bearer paper the rights of

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<sup>5</sup> A holder of bearer paper is the person entitled to payment. RCW 62A.3-205(b), 62A.3-301.

enforcement may be passed by mere delivery. The delivery of the bearer interest coupons to Jerry passed to him all of the incidents of ownership and made him a Holder entitled to enforce the instrument.

(9) **Trial Court Damages Calculations**

James generally assails the calculation of those damages the trial court assessed against Jerry, but provides no basis to overturn the court's judgment.

The fact finder determines the amount of damages. Mason v. Mortgage Am., Inc., 114 Wn.2d 842, 850, 792 P.2d 142 (1990). Accordingly, a damage verdict should not be disturbed unless it is not supported by substantial evidence, shocks the conscience, or resulted from passion or prejudice. Mason, 114 Wn.2d at 850. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. In re Estate of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004).

In this case, neither the allegedly lost appreciation on the K-mart bonds nor a loss on the high tech stocks were proven with any degree of reasonable certainty. The trial court, having sat through four days of testimony was fully aware of the alleged damages. The court was not inclined to adopt the speculation and slight of hand advocated by James. While it was determined that a fiduciary breach occurred with respect to

the purchase of K-mart bonds, there was no proof that the bonds could have been invested and returned the yield for which he now argues.

As for the high tech stocks there is a significant amount of testimony that the loss can be traced directly to the conduct of James. James even admits making the recommendation that the Estate be invested in high risk tech stocks (which again is fundamentally inconsistent with his testimony that he wanted the Estate closed). RP 692:23 - 693:4. In light of James direct and material participation in this Estate investment, the treatment of the loss was appropriate.

(10) **Attorneys' Fees.**

(a) **Attorneys' Fees to the Estate**

The award of attorneys' fees in this case was clearly within the discretion of the trial court. RCW 11.96A.150 permits a court to:

“order costs, including attorney’s fees, to be awarded to any party: (a) from any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs to be paid in such amount and in such manner as the court determines to be equitable”.

RCW 11.96A.150.

James misplaces his reliance on a pre-TEDRA trust case to suggest that there is no discretion given to the trial court and that all of the attorney’s fees incurred in a probate case must be paid by a personal

representative if any breach of fiduciary duty is found. Allard v. Pacific National Bank, 99 Wn. 2d, 394, 663 P.2d 104 (1983) Specifically, the Court in Allard noted the trial court discretion's in this area, but stated that there were limits on the court's authority. It held that the trial court abuses its discretion "when it awards attorney fees to a trustee for litigation caused by the trustee's misconduct." Id. at 408.

Allard is distinguishable on a number of grounds. It involved a trust (not an estate), a professional trust company (not a lay executor) and no complicity whatsoever by the complaining beneficiary. In fact, the beneficiary in Allard did not even have notice of the actions that were later alleged to be a breach, in the instant action James was an active participant. It did not involve a defaulted \$188,000 loan by the complaining beneficiary. Notably, unlike the present case, the trustee in Allard had been awarded *its* attorney's fees following trial.

Jerry was awarded no attorneys fees and in fact was ordered to pay half of the Estate's attorney's fee and costs and half of the contingency beneficiaries of the James Trust's attorney's fees and costs.

It is also important to note that one of the underlying considerations for the trial court in exercising its discretion is whether the participation of the party seeking fees caused a benefit to the trust. In this case, as the court found that James's conduct was a significant factor in

the breaches of fiduciary duty of which he complained. It was not an abuse of discretion to make him pay a portion of the Estate's attorneys' fees. Nor was it an abuse of discretion to deny his request for attorneys' fees against the personal representative.

James and Jerry acted jointly to prolong the administration of this Estate, to the extent that their actions have resulted in fees they should each be made to account to the Estate. It was the opinion of the trial court that their joint venture in these breaches was a proximate cause of a loss for which the Estate should be compensated. RP 884:4-13.

Unlike the beneficiaries that have been awarded fees in other breach of trust cases, James was an active cause of the litigation for which he is now seeking fees. He took loans from the Estate on which he defaulted, made investment recommendations and worked with the personal representative to prolong administration. To award James attorneys fees in spite of his active participation in the complained of breach would be fundamentally inequitable. In any event, the division of attorney's fees awarded by the Court was within the statutory authority granted to it and should stand.

**(b) Attorneys' Fees on Promissory Note Collection**

As was noted by the trial court, James's failure to repay the Note to the Estate was a substantial cause of this litigation. RP 884:4-12. As there

was no finding that the claims in this matter were inseparable, the trial court had a duty to determine those fees reasonably attributable to the recovery. Kastanis v. Educational Employees Credit Union, 122 Wn.2d 483, 859 P.2d 26 (1993). The fee affidavit presented to the trial court clearly demonstrated that services were rendered in connection with both the note collection action and the defense of claims advanced by James – often times simultaneously.

Where claims are so related that no reasonable segregation of claims can be made, there need be no segregation of attorney fees. Pannell v. Food Servs. of Am., 61 Wn.App. 418, 447, 810 P.2d 952, 815 P.2d 812 (1991), *review denied*, 118 Wn.2d 1008, 824 P.2d 490 (1992). Here the claims were so interrelated that it was not possible to reasonably segregate the value of the Note claim from the other claims. The trial court chose a proxy based on the fee affidavit submitted for what it felt were reasonable fees for the collection of the Note. The court had already noted that as a practical matter it had not been possible to close the Estate from 1998 through the time of trial due to James' outstanding and defaulted Note.

**(c) Attorneys' Fees to James' Children**

The court also required that Jerry and James equally reimburse the contingent beneficiaries of the James Trust all of their fees and costs. Again, this award was entered as part of the equitable powers of the court

in an estate matter. RCW 11.96A.150. Specifically, the trial court was correct in its award of fees because it preserved the common fund.

In this case, the court heard a substantial amount of testimony regarding the joint venture between James and Jerry that prolonged estate administration. James' children indicated that they were looking first to Jerry for a payment of fees but would also accept James as a proper payer of fees. RP 880:17-20. As both James and Jerry were participants in the prolonging of the administration of this Estate, it was appropriate for the trial court to require each of them to pay a share of the intervenor plaintiffs' fees and costs. This requirement preserved the common fund from which James' children may one day benefit.

(11) **Attorneys' Fees on Appeal.**

Jerry is entitled to his costs and attorneys' fees on appeal pursuant to RAP 18.1 and RCW 11.96A.150.

**CONCLUSION**

Using its equitable powers, the trial court properly allocated damages between two brothers who prolonged the administration of this Estate and otherwise prevented it from being closed expeditiously. As the trial court held, James was an active and substantial participant in the delay of closing the Estate, and equity should not now permit him to profit from his wrongful conduct.

Notably, the trial court held Jerry significantly responsible for damages claimed against him and entered judgment against him in an amount close to \$200,000, despite the fact that to this day, he has not taken any material distribution of the 60% of the Estate to which he is entitled.

This court should affirm the trial court's judgment and award Jerry his attorney's fees on appeal.

Dated this 1<sup>st</sup> day of May, 2007.

**TURNBULL & BORN, P.L.L.C.**

By

  
\_\_\_\_\_  
BRIAN M. BORN, WSBA 25334  
ERIC M. MOUNT, WSBA 32973  
Attorneys for Gerald Johannes

**APPENDIX 1**

# PROMISSORY NOTE

\$ 300,000  
Amount

Puyallup, Washington, June 19, 1995  
City Date

30 days after date, without grace, I promise to pay to the order of Estate of Evelyn Johannes  
Term of Note Capitalitor

the sum of Three hundred thousand (\$300,000) Dollars for value  
Amount

received, with interest at the rate of 5% percent per annum from date until maturity, interest payable

at maturity, and if not so paid, the whole of this note, both principal and interest, shall forthwith  
Monthly or at Maturity

become due and payable without demand at the option of the holder. After maturity, or on default, this note bears interest at the rate of \_\_\_\_\_ percent per annum until paid. Principal and interest payable in lawful money of the United States. In case suit or action is commenced to collect this note or any portion thereof I promise to pay, in addition to the costs provided by statute, such sum as the court may adjudge reasonable as attorney's fees therein, (including any action to enforce the judgment and the provision as to attorney's fees and costs shall survive the judgment.) Any judgment entered hereon shall bear interest at the rate of \_\_\_\_\_ percent per annum.

Due July 19, 1995.  
Date of Final Payment

Address \_\_\_\_\_

VADLEY PARKERS  
Signature: \_\_\_\_\_

Signature \_\_\_\_\_

Signature \_\_\_\_\_

No. \_\_\_\_\_

Promissory Note  
Washington Legal Blank, Inc., Issaquah, WA Form No. 261 10/90  
MATERIAL MAY NOT BE REPRODUCED IN WHOLE OR IN PART IN ANY FORM WHATSOEVER.

8/1

*DONNER -  
PLEASE  
FILE.*

500

## **APPENDIX 2**

# PROMISSORY NOTE

\$ 188,000  
Amount

Puyallup, State of Washington, March 26, 1998  
City Date

Six months to September 26, 1998 after date, without grace, I promise to pay to the order  
Term of Note

of Estate of Evelyn Johannes the sum of  
Creditor

One hundred eighty eight thousand dollars Dollars  
Amount

for value received, with interest at the rate of 8 percent per annum from date

until maturity, interest payable at maturity, and if not so paid, the whole  
Monthly or at Maturity

of this note, both principal and interest, shall forthwith become due and payable without demand at the option of the holder. After maturity, or on default, this note bears interest at the rate of 8 percent per annum until paid. Principal and interest payable in lawful money of the United States. In case suit or action is commenced to collect this note or any portion thereof I promise to pay, in addition to the costs provided by statute, such sum as the court may adjudge reasonable as attorney's fees therein, (including any action to enforce the judgment and this provision as to attorney's fees and costs shall survive the judgment.) Any judgment entered hereon shall bear interest at the rate of 8 percent per annum.

Due September 26, 1998  
Date of Final Payment

Jim Johannes

[Signature]  
Maker  
Maker  
Maker

201 West Main  
Address

Puyallup, Wa 98371

No. 1

Int. 2.00 - 5.00 - 5.00 = 15.000  
243.040  
- 1000?  
218.040  
- 1000?  
118.040  
- 1000?  
18.040  
- 1000?  
8.040

**COPY**

No. 35504-3-II

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

---

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

Appellants,

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

Respondents,

SHERRY KAY FERRANTE, KATHLEEN D.  
YORMARK, JEFFREY W. JOHANNES,  
MATTHEW S. JOHANNES and TIM F. JOHANNES,

Cross Appellants,

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

Cross Respondents.

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DIVISION II

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CERTIFICATE OF SERVICE  
OF  
BRIEF OF RESPONDENT

---

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Eric M. Mount, WSBA 32973  
Attorneys for Gerald Johannes

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CERTIFICATE OF SERVICE

I certify that on the 2<sup>nd</sup> day of May, 2007, I caused a true and correct copy of the Brief of Respondent to be served on the following by the method indicated below:

Counsel For Appellant James Johannes, by U.S. Mail, first class, postage prepaid:

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Fircrest, WA 98466

Personal Representative, by U.S. Mail, first class, postage prepaid:

James F. Christnacht  
6602 -19<sup>th</sup> Street West  
Tacoma, WA 98466

Dated this 2<sup>nd</sup> day of May, 2007.

  
\_\_\_\_\_  
Zakiya Shaw