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No. ~~69546~~ 69546-1

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

IN RE THE ESTATE OF T. MARK STOVER, Deceased,

TERESA VAUX-MICHEL,

Respondent/Cross-Appellant,

v.

ANNE VICTORIA SIMMONS, as Personal
Representative of the Estate of T. MARK STOVER, Deceased,

Appellant.

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT
TERESA VAUX-MICHEL

Brian Fahling, WSBA #18894
Law Office of Brian Fahling
4630 116th Ave. NE
Kirkland, WA 98033
(425) 202-7092

Attorney for Teresa Vaux-Michel


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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

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I. ARGUMENT

A. The Trial Court Erred when it Failed to Award Both Checks to Vaux-Michel

1. Both checks should have been awarded to Vaux-Michel

Ms. Simmons argues that Ms. Vaux-Michel has not established by clear and convincing evidence that the check found by Ms. Simmons was intended as a gift *causa mortis* for Ms. Vaux-Michel. Appellant Response to Cross Appeal, p. 28. Ms. Simmons is wrong.

Even though the trial court ruled that the check found by Ms. Simmons and the check found by Detective Luvera were authentic, CP 116-117, and that “the circumstances show that Mr. Stover did all that, in his opinion, was necessary to do to accomplish delivery of the *checks*,” CP 118-120, it awarded Ms. Vaux-Michel only the proceeds of the \$150,000 check found by Detective Luvera. The failure to award both checks to Ms. Vaux-Michel was error.

It was error because the factual and legal grounds relied upon by the trial court in ruling that Mr. Stover intended the check found by Detective Luvera as a gift *causa mortis* for Ms. Vaux-Michel are precisely the factual and legal grounds that likewise require awarding the check found by Ms. Simmons to Ms. Vaux-Michel. The only difference between the two checks Mr. Stover made out to Ms. Vaux-Michel is that the

Luvera check awarded by the court to Ms. Vaux-Michel was found on Mr. Stover's desk and the other check, the one found by Ms. Simmons, was found in his desk drawer. And without restating everything from her Answer Brief here, but incorporating the same by reference herein, the same facts of the case, the same arguments and the same findings and conclusions set forth by the trial court in support of its award of the Luvera check to Ms. Vaux-Michel apply with equal force to the Simmons check. CP 111-118.

2. Approximately one month before being murdered, Mr. Stover rescinded a writing conveying his business, but he never rescinded or revoked the checks he intended for Vaux-Michel

The evidence of Mr. Stover's intent regarding Ms. Vaux-Michel and his belief that he had done everything necessary to deliver the checks is both clear and convincing for a variety of reasons. First, just five weeks before he was murdered, Mr. Stover rescinded a document he created in November 2007 wherein he left his business to two employees if he died. IRP at 47-48; CP 115. Though he easily could have, Mr. Stover never rescinded or revoked either of the \$150,000 checks he wrote to Ms. Vaux-Michel. CP 115.

The checks written by Mr. Stover to Ms. Vaux-Michel were undoubtedly gifts causa mortis. The evidence for each and every element,

including constructive delivery of the checks, was beyond substantial, it was conclusive. Mr. Stover's intent to marry Ms. Vaux-Michel and his intent that she receive the checks he had written to her if he was murdered was obvious and clear. CP 113-114. He told at least two people specifically that he left a check for Ms. Vaux-Michel, and six people, including close friends, that he intended to marry Ms. Vaux-Michel and that he wanted to provide for her if he was murdered.

To be sure, it is true, as Ms. Simmons points out, that two witnesses testified that Mr. Stover spoke of a "check," Appellant's Reply Brief at p. 28, but it is equally true that many witnesses testified that Mr. Stover wanted to see that Ms. Vaux-Michel was provided for if he were murdered, thus the trial court found that "Mr. Stover did all that, in his opinion, was necessary to do to accomplish delivery of the *checks*". CP 118-120 (emphasis supplied).

Evidence of Mr. Stover's intent could hardly be more compelling. He told Jeannie Nordstrom that Ms. Vaux-Michel had "saved his life and that they were going to get married." 2RP at 4-5; CP 113. The day before he went missing, he told Shelly Hyrkas, a friend for 15 years, that he had proposed to Ms. Vaux-Michel and he then showed Ms. Hyrkas the ring he had purchased for her. 1RP at 93-96, 103-104. Mr. Stover told Mr. Kradel he wanted to marry and take care of Ms. Vaux-Michel. 1RP at 32; CP 113.

He told Ms. Hearon that, in the event the Opdyckes were successful in having him killed, he had left a check for Ms. Vaux-Michel in plain sight on his desk. 2RP at 10; CP 113. Mr. Stover told Andrea Franulovich that Ms. Vaux-Michel was “the love of his life,” that he had asked her to marry him, that she said yes, and that he had left her a check because he wanted to take care of her in case something happened to him. 1RP at 109-113; CP 113-114. And he often told Elizabeth Dorris, a ten year employee of his, of his love for Ms. Vaux-Michel and that he was going to marry her and wanted to take care of her if something happened to him. 1RP 113-115; CP 113.

3. Ms. Simmons was deceitful about the checks

Moreover, it bears repeating that the facts clearly demonstrate that Ms. Simmons did not testify truthfully and that she did everything she could to see that Mr. Stover’s desire to take care of Ms. Vaux-Michel was thwarted. A little more than a month after Mr. Stover was murdered, she went to Mr. Stover’s house with Ms. Hearon, a private investigator, to go through his personal effects and to look for a will. 1RP at 21; 2RP at 10-11; CP 114. Ms. Simmons’ testimony about what happened thereafter, both in her declaration opposing Ms. Vaux-Michel’s petition, and at trial, was sharply contradicted by Detective Luvera and Ms. Hearon.

Ms. Hearon testified that as they were going through Mr. Stover's effects, Ms. Simmons screamed when she found the check made out to Ms. Vaux-Michel, and that Ms. Simmons told her she found the check somewhere on Mr. Stover's desktop. CP 27; 2RP at 12-15. Ms. Hearon then told Ms. Simmons of Mr. Stover's intent to marry Ms. Vaux-Michel, of his fear that he would be murdered, and that he had written the \$150,000 check to Ms. Vaux-Michel because he wanted her to be taken care of if he was murdered. CP 26-27; 2RP 14-15; CP 115.

Ms. Hearon also testified that Ms. Simmons told her that she had been estranged from her brother for 20 years. 2RP 15-16. Ms. Simmons, however, testified in her declaration and at trial that she was not estranged from her brother, that she found the check, not on the desktop, but hidden in a drawer, and that Ms. Hearon didn't say anything about prior knowledge of the \$150,000 check nor did Ms. Hearon tell her about Mr. Stover's love for Ms. Vaux-Michel and his desire for her to have the check. CP 80-81; 1RP 21-22.

Ms. Simmons again, in her declaration, and at trial, stated several times that no one, including police who had searched the house, said anything to her during that period about Mr. Stover writing a check in any amount to Ms. Vaux-Michel. CP 80-81; 1RP at 65.

Detective Luvera, however, testified at trial that in late October 2009 he searched Mr. Stover's home and found on top of Mr. Stover's desk a check in the amount of \$150,000 made out to Ms. Vaux-Michel. IRP 86; CP 114. The check was found along with some other checks. IRP at 86-87; CP 114. Detective Luvera called Ms. Simmons and told her about the check and she told him to mail the check to her in a pre-paid envelope she had provided. IRP at 87-88; CP 114. Detective Luvera mailed the check to Ms. Simmons. IRP at 88; CP 114. As noted above, though, Ms. Simmons said that Detective Luvera never called her to tell her about the check, that she never told him to send her the check, and that she never received such a check.

The trial court, after hearing all of the testimony, was dubious about Ms. Simmons' truthfulness, concluding: "*Respondent either found or represented that she had found a check in the amount of \$150,000. . . .*" CP 114 (emphasis supplied).

4. Ms. Simmons attempted cover-up of the Luvera check resulted in the late claim for the check

Ms. Simmons suggests that the claim for an award of \$300,000 "appears to have been an afterthought by her trial attorney," Appellant Response to Cross Appeal, p. 28; the claim, however, was not an afterthought, but a claim delayed by Ms. Simmons' "nearly successful

effort to cover-up the \$150,000 check found by Detective Luvera.” CP 147. The undersigned “only interviewed Detective Luvera on August 28, 2012 to follow-up on Respondent’s deposition testimony that she had contacted him about the check she found.” *Id.* When asked if the Respondent had told him about the check made out to Ms. Vaux-Michel, the Detective looked “quizzical[,]” and said, “she didn’t find the check, I did.” *Id.* “The Detective then explained how he found the check on Mr. Stover’s desk, “that he called Respondent and told her about the check in early November 2009, and that he sent the check and other mail to her in a pre-paid envelope or box she provided.” *Id.* Ms. Simmons produced a copy of the \$150,000 check after the undersigned met with Detective Luvera, and on September 4, 2012, a copy of the check was emailed to Detective Luvera, who responded on September 5 as follows:

Brian,

Thanks, I did look at the photo of the check. This one is definitely attached to a ledger type checkbook. The one that I found was a single check all by itself in a pile of other checks and documents on the desk top in the upstairs loft area. I recall the check was on the Vanguard account made payable to Theresa Vaux-Michael in the amount of \$150 thousand dollars. As far as Vickie's answers to the check she claimed to find I don't recall Vickie telling me that she found a check or her offering that check to me. but I did tell her that I had found a check on Stover's Vanguard account made payable to Theresa Vaux-Michael in the amount of \$150 thousand dollars and did mail that check to Vickie along with other mail that belonged to Stover. I would like to believe that Vickie did find this check as she claims and if that is the case there is a second check made payable to Theresa Vaux-Michael in the

amount of \$150 thousand dollars that I had found and told her about and sent that check to her.

Id.

Ms. Simmons should not be permitted to profit from her dishonesty, and Ms. Vaux-Michel should not be denied the gift that was Mr. Stover's dying wish. The trial court erred when it did not award the second check.

B. The Trial Court Erred in Reducing Vaux-Michel's Attorney's Fee Request

Ms. Simmons, in another unfortunate *ad hominem* attack, alleges that the undersigned's fee request is "a thinly disguised effort to obtain his contingent fee." Appellant Response to Cross Appeal, p. 31. Very simply, the hours submitted were the hours worked. CP 145-168.

The pertinent parts of Ms. Vaux-Michel's Answer Brief are incorporated herein in support of and in reply to the remainder of Ms. Simmons' arguments regarding attorney's fees.

Ms. Simmons claims that if she prevails she should be awarded attorney's fees and costs from trial and fees on appeal. For the reasons set forth herein and those in Ms. Vaux-Michel's Answer Brief which she incorporates herein by reference, Ms. Simmons' appeal is without merit and should be denied. For the reasons set forth herein and in her Answer Brief, Ms. Vaux-Michel requests that her full attorneys fees and costs be

awarded for prevailing at trial and that her fees and costs on appeal also be awarded.

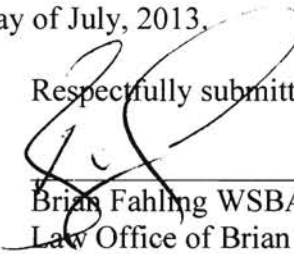
II. CONCLUSION

For the reasons set forth herein and in her Answer Brief which is incorporated herein and relied upon by reference, Ms. Vaux-Michel requests that this Court deny Ms. Simmons' appeal in all its parts and allow Ms. Vaux-Michels' cross-appeal in all its parts, including ruling that the trial court erred in not awarding her the proceeds of the second check and in reducing her attorney's fees by one-third.

The case should be remanded to the trial court with instructions to enter judgment for Ms. Michel in the amount of \$300,000 and attorney's fees in the amount of \$60,000 plus costs and statutory interest and such other relief as this court deems appropriate. Costs on appeal, including reasonable attorney's fees should likewise be awarded to Ms. Vaux-Michel.

DATED this 15th day of July, 2013,

Respectfully submitted,



Brian Fahling WSBA #18894
Law Office of Brian Fahling
4630 116th Ave. NE
Kirkland, WA 98033
(425) 202-7092
Attorney for Teresa Vaux-Michel

DECLARATION OF SERVICE

On said day below I deposited in the U.S. Mail a true and accurate copy of REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT TERESA VAUX-MICHEL in the Court of Appeals, Division I, Cause No. 69546-1-1 to the following:

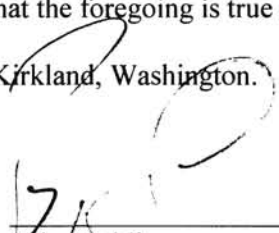
Philip A. Talmadge Talmadega/Fitzpatrick 18010 Southcenter Parkway Tukwila, WA 98188	John Sherwood Peterson Russell Kelly PLLC 10900 NE 4 th St Ste 1850 Bellevue, WA 98004-8341
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Original filed with:

Court of Appeals
Clerk's Office
600 University St.
Seattle, WA 98101

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

DATED: July 15, 2013, at Kirkland, Washington.



Brian Fahling
Law Office of Brian Fahling