No. 91107-0

SUPREME COURT OF THE STATE OF WASHINGTON

JAMES YOUNG,

PETITIONER,

V.

SEI PRIVATE TRUST CO.
A FOREIGN CORPORATION
AND R. AUGUST KEMPT, dba
KEMPT AND COMPANY,

RESPONDENTS.

PETITONER'S MOTION FOR DISCRETIONARY

REVIEW

Robert H. Stevenson, WBA 519
Attorney for Petitioner
810 3rd Ave. #228
Seattle, Wa. 98104
(206) 682-3624

TABLE OF AUTHORITIES

A. IDENTITY OF THE APPELLANT

James Young asks this Honorable Court to accept review of the unpublished decision of the Court of Appeals, Division 1, filed September 22, 2014. Attached is Appendix A containing a copy of said decision.

B. ERRORS OF THE Court OF APPEALS

!.Refusing appellant a trial on the merits.

2. Finding an implementation of a divorce decree by way of a QDRO had priority over a divorce decree placing legal title to a stock account in Young.
3. Finding that misrepresentations of the stock broker had not been well pleaded or averred by Young.
4. Refusing to find separate causes of actions brought by Young with each party to this action prevailing on each.
5. Awarding attorneys' fees in the trial court and in the Court of Appeals that are grossly higher than the original amount involved and refusing oral argument to Young to effect a segregation of the fees for the two causes of action.
¢. Finding that Young had not given a copy of his divorce decree and requesting an accounting from Kempt at the time of the entry of the decree.
6. Finding that Youg never appeared at the resumption of a second summary judgment hearing when oral argument was refused Young by the trial court.
7. Finding " a complete failure of proof" by Young on summary judgment when the judicial admissions of Kempt's own attorney revealed false information by Kempt and a cover-up of the truth that Kempt had wrongly distributed $3900 belonging to Young, to Billie Dunning.

C. STATEMENT OF THE CASE

This case is twofold: an action for an accounting and an action for monies unlawfully paid to a stock broker's client instead of the Petitioner James Young. Young was awarded his wife's stock account by a Decree of Divorce on March 23, 2012. August Kempt was a stock broker for SEI Private Trust and handled both accounts for Young and his wife, Billie Dunning.

Upon the entry of the decree Young personally handed a copy to Kempt and asked that the account be disbursed to him as per the decree. Young also asked at the same time for an accounting of the account for 2012. Kempt refused the accounting: it was not given to Young until the passage of six months.

In September of 2012, Kempt gave Young an accounting, and paid him the "balance" of the account in the sum of $46,860. But the accounting,showing a balance of some $3900,was explained as only " a change in value". In the accounting, that money was paid to Billie Dunning's account at Key Bank and shown as $3500, and unknown to Young until 18 months later at a hearing for Summary Judgment by Kempt.

Young, frustrated by not being able to find out where the $3900 went, brought an action in the superior court for a full accounting. Kempt moved for summary judgment of dismissal. Young Amended his accounting complaint to seek the $3900 that had not been paid to him. The basic concept of the pleadings on summary judgment, included breach of Kempt's fiduciary duty to Young and negligence and misrepresentaion. CP 25; CP 29; Summary Judgment Log E863. During the summary judgment hearing, the attorney for Kempt judicially admitted he did not know whether Dunning had withdrawn the $3900. He claimed that "someone drew the $3500 out of the account. Later he corrected that statement to there was a withdrawal. The trial court held that Kempt had no duty to Young because he was not a party to the decree.Summary Judgment Log E 863, pp. 11, 12, 13. The court found no fiduciary duty.

The trial Court awarded Kempt $9,271 in attorneys' fees and costs. The Court of Appeals allowed Kempt $7274 and at this time have indicated it will add additional fees for Kempt's Reply to Young objections to the fees.

D. WHY THIS COURT SHOULD ACCEPT REVIEW

1. THERE ARE GENUINE ISSUES OF MATERIAL FACT FOR TRIAL AND CREDIBILITY OF WITNESSES

Contrary to the trial Court and the Court of Appeals, Kempt was a fiducary to both Young and Billie Dunning in the handling of their stock accounts. A fiduciary has the highest obligation of loyalty and good faith. He has the additional requirement of honesty and complete disclosure of matter within his knowledge. He must act in the best interest of his beneficaries. A stock broker is a fidiciary. National Bank v. Equity Investors, 81 Wash. 2d 886, 506 Pac. 2d 20(1973). This case presents genuine issues of material facts as to the knowledge and handling of the Billie Dunning account after knowledge of the award to Young and the false representaions of the whereabouts of the $3900 paid wrongly to Billie Dunning.

The Court of Appeals was in error when it found that Young did not notify Kempt at the time of the entry of the decree. Kempt has never denied this fact and the declaration of Young expressly notified Kempt at the date of the decree's entry. CP 42,pp. 1 sec. 2 and 3.

The trial court and Court of Appeals are in error in holding that a QDRO order implementing the divorce decree placed legal title in Billie Dunning. The rule in this state is that a decree of divorce places legal title in the awarded party upon the entry of the decree, and divests the other party of title. United etc. Co. v. Price, 46 Wash.2d 587, 283 Pac.2d 119(1955).

> The decree operates not only to vest in the spouse designated the property awarded to him or her, but to divest the other spouse of all interest in the property so awarded, exceptas the decree might otherwise designate.

decree of divorce and why Kempt continued to hide the disbursement to Billie by calling the monies owed to Young as a " change in value", when he knew that was a false and misleading statement which precipatated the lawsuit by Young. Even when evidentiary facts are not disputed, a motion for summary judgment is defeated if different inferences can be drawn from evidence in the record as to the ultimate facts such as, intent, knowledge, good faith, or negligence. All of these involve an issue of credibility which should be resolved by trial. Hudesman v Foley, 73 Wash. 2d 880, 441 Pac. 2d 532 (1968); Balise v. Underwood, 62 Wash 2d 195, 381 Pac. 2d 966 (1963); RCW 21.20.010(unlawful to make an untrue statement, act or practice in course of business).

2. IT WAS ERROR TO CONCLUDE THAT YOUNG HAD NOT CONTENDED THAT KEMPT HAD COMMITTTED NEGLIGENT MISREPRESENTAION

The Court of Appeals was in error when it held that Young had not presented material factual issues under the theory of negligent misrepresentation because he had not pleaded or argued this claim to the trial court. (Decision, pp.5). Young's entire claim in his Amended Complaint and Answer to Kempt's allegation, was the disbursement of his funds to Billie Dunning without his consent or knowledge. Young based his entire case on what amounts to negligent misrepresentation and constructive fraud of Kempt and SEI. It isn't leggaly necessary to place a name on legal theories. Butko v. Stewart Title Co., 99 Wash. App. 533, 553 (2000). In Butko the court was confronted with the liability of an escrow agent of the title company for the escrow holder's breach of a fiduciary duty to disclose alleged fraud of one of the parties to the escrow. A summary judgment of the trial court was reversed on the basis of the knowledge presented of the escrow company of the fraud.

It is,therefore, immaterial what Young's cause of action is called or designated. Young charges false representations by

Kempt and SEI with respect to the untruthfullness of the whereabouts of the monies due Young. The Declaration of Young before the trial judge was to the effect that he had received an accounting but was not satified as to where the money due him went. At the summary judgment hearing, Kempt's attorney advised the court that the $3903 claimed by Young was "just an increase in the value of the stock account." He told the court that he didn't know when Billie Dunning had withdrew those funds. (Summary Judgment Hearing Log, pp.9 and 10); CP27.

3. IT WAS ERROR TO HOLD THAT THERE WASN'T TWO SEPARATE CAUSES OF ACTION IN WHICH BOTH YOUNG AND KEMPT PREVAILED

The trial court itself judicially found that Young had received an accunting. Despite this finding, the Court of Appeals found the opposite. (Decision, pp. 6);(Summary Judgment Hearing Log, pp. 8, l. 20).

> THE COURT: And you said you wanted an accounting.
>
> MR. STEVENSON: We wanted.....
>
> THE COURT: In April this is what you got.
>
> MR. STEVENSON: Yes

In this state an equitable accounting and an action for falsely hiding monies in a fiduciary relationship are two separate actions. An Amended complaint by Young after receiving an accounting does not relate back to the accounting cause of action and is a separate suite in and of itself. Ennis v. Ring, 300 Pac.2d 773(1956):

> We are committed to the rule that, if an amended complaint(1) adds a new cause of action, or abandons a former theory or cause of action, it does not relate to the original complaint, but instead, rests the action upon the pleadings as amended.

The Court of Appeals refused to recognize this fundemental rule,and by so doing, refused to find that both parties had recovered on separate causes of action. (Decision, pp.6).

The Washington rule is that where both parties prevail, neither are entitled to attorneys' fees. Muscek v. Equitable Sav. and Loan Assn. 25 Wash.2d 546, 17 Pac.2d 856(1946); Sardaun v. Mosford, 51 Wash. App. 980, 756 Pac.2d 74(1988); American Nursey v. Indian Wells, 115 Pac.2d 477(1990). Muscek stated:

> The established procedure in this jurisdiction is for the court to first try the question of whether an accounting will lie. If that question is answered in the affirmative, the court then enters an interlocutory order that the accounting be had. (and then entering a final money judgment).

In Muscek, the entry of a final judgment before an accounting, was reversible error. Young prevailed on the accounting but the case was dismissed on the second separate action for recoveryof the funds. Both parties prevailed in separate causes of actions and no fees should have been awarded either party. The award was an abuse od discretion on untenable grounds.

4. THE ATTORNEYS" FEES ARE GROSSLY EXCESSIVE WHEN COMPARED WITH THE AMOUNT OF MONEY SOUGHT BY YOUNG

The trial court fixed Kempt's attorneys' fees and costs at $9271. The Court of Appeals set the appeal fee at $7274 and are going to allow additional fees for Kempt's Answer to Young's Objections to Costs. These fees are grossly excessive and unfair in light of the total sought by Young of $3903. In Scott Fetzer Co. v. Weeks, 122 Wash.2d 141(1993), the Court refused to permit the Defendant's to assess unfair and excessive fees for a motion to dismiss Plaintiff's Complaint for recovery of $19,000 for 120 vacuum cleaners. The intitial attorneys' fees requested by the Defendants four attorneys was

$180,914. The trial court allowed $116,778. The Plaintiff, whose Complaint was dismissed under the long-arm statute .

The Supreme Court sent the case back for reconsideration of that fee for four attorneys' work. The trial court on remand awarded $116,778.

The Supreme Court again reversed the award as unduly excessive and four the second time remanded for reconsideration of the fees. This time the trial court reduced the amount to $72,746.

On yet another appeal, the Supreme Court reduced the fees to $22,454. The reasoning of the court is applicable here. Weeks stated its logic in the reduction:

> " What is particularly obvious in this case is the gross disparity between the amount requested, and even the amount actually awarded by the trial court, <u>when compared to the amount in controversy</u>.....While the amount in dispute does does create an absolute limit on fees, that figure's relationship to the fees requested or awarded is a vital consideration when assessing their reasonableness." (Emphasis Added).

The sum of $16,545 for attorneys' fees and costs in this case is a "gross disparity" between the amount requested by Young and the amount awarded by the trial court and the Court of Appeals. The fees, if this matter is not remanded for a trial, should be substantially reduced or segregated based on the separate actions of Young. <u>Kastanis v. Employees Credit Union</u>, 122 Wash.2d 483, 865 Pac.2d 507(attorney fee must be segregated by the court when separate actions prevail).

4. CONCLUSIONS A. This case should be reversed and remanded for trial;

B. There are genuine questions of material fact and credibility to be determined by a trial with regard to why Young did not receive monies awarded to him by a divorce court and dis-

bursed to the former wife with misrepresentation or fraud of Kempt. RCW 21.20.010

C. Neither Young nor Kempt prevailed on both causes of action, to wit: accounting and damages for failure to pay Young by deception.

D. The entire Motion for Summary Judgment by Kempt proceeded on the basis that Kempt and SEI had misrepresented the accounting given to Young and Kempt never objected to the Declarations and briefs submitted by Young adopting this basis. CR 8(f), Rules of the Superior Court.

E. Misrepresentation and or constructive fraud is a question of credibility for trial not summary judgment.

F. The attorneys' fees and costs in this case are a gross disparity between the amount sought and the amount of the fees and should be substantially reduced as a matter of simple justice .

G. An accounting and suit for damages for failing to pay funds are two separate actions and the second suit does not relate back to the action for accounting.

Dated this 30th day of October, 2014.

Robert H. Stevenson, WBA 519
Attorney for James Young

On this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the attorney of record for plaintiff/defendant, containing a true copy of the document to which this affidavit is affixed.

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

11-4-14

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAMES YOUNG, Appellant, v. SEI PRIVATE TRUST COMPANY, a foreign corporation and R. AUGUST KEMPF, dba Kempf and Company, Respondents, and T.D. AMERITRADE, a corporation, Defendant.	No. 70922-4-I DIVISION ONE UNPUBLISHED OPINION FILED: September 22, 2014

TRICKEY, J. — In order to defeat a supported motion for summary judgment, the nonmoving party must demonstrate a genuine factual issue as to every element of the case. Appellant James Young failed to make any showing that respondent R. August Kempf improperly disbursed funds from an investment account. Consequently, the trial court properly dismissed Young's claims against Kempf on summary judgment. Because Kempf was the prevailing party in an action alleging damages of $10,000 or less, the trial court did not err in awarding reasonable attorney fees under RCW 4.84.250. We affirm.

FACTS

The material facts are not disputed. James Young and Billi Dunning dissolved their marriage on March 23, 2012.[1] The dissolution decree awarded Dunning's

---

[1] Clerk's Papers (CP) at 67.

individual retirement account (IRA) to Young.[2] SEI Private Trust Company (SEI) was the IRA plan administrator. R. August Kempf is the president of Kempf & Company (collectively Kempf), which managed Dunning's IRA account.[3]

Young alleges that at some unspecified date after the dissolution, he provided SEI with a copy of the decree and "personally notified Kempf of [the award of the IRA] and asked that it be transferred directly to me so that no further trades could be made by my wife."[4] Young also requested a detailed accounting of the transactions for the year 2012.[5]

On September 10, 2012, Dunning withdrew $3,500 from the IRA.[6] On September 19, 2012, the dissolution court entered a qualified domestic relations order (QDRO) granting Young, as the alternate payee, "the right to receive 100% of the Participant[Dunning's] account under the Plan as of the date of distribution (date it is transferred to the Alternate Payee)."[7] The QDRO directed that payment be made to Young "as soon as practicable" after service of the order on SEI.[8] On September 25, 2012, SEI distributed the balance of the IRA, $46,778.72, to Young and closed the account.[9]

---

[2] CP at 118.
[3] CP at 20.
[4] CP at 118.
[5] CP at 119.
[6] CP at 27.
[7] CP at 85.
[8] CP at 85.
[9] CP at 28-29.

On March 26, 2013, Young filed a complaint for account disclosure against Kempf, requesting an accounting for the IRA.[10] Kempf provided Young with a complete accounting in April 2013.[11]

On May 24, 2013, Young filed an amended complaint, alleging that he was entitled to an additional $3,903.00 from the IRA because Kempf and SEI had disbursed the amount even though they had "actual and constructive knowledge that the particular account was the property of Plaintiff." Young asked for the entry of a judgment in this amount against Kempf and for an award of reasonable attorney fees and costs.[12]

Kempf moved for summary judgment.[13] During the course of the motion hearing on August 9, 2013, Young suggested that Kempf had improperly disbursed $3,500 to Dunning because he had already received notice of the QDRO.[14] The trial court continued the hearing to permit the parties to provide the details about the QDRO, which was not in the record before the court.[15]

When the hearing resumed on August 23, 2013, neither Young nor his counsel appeared.[16] The trial court granted summary judgment, dismissed all of Young's claims

---

[10] CP at 1. The complaint also named "Ameritrade" as a defendant. Young's claims against Ameritrade are not part of this appeal.
[11] CP at 46.
[12] CP at 3-4.
[13] CP at 15.
[14] Report of Proceedings (RP) at 22.
[15] RP at 25.
[16] CP at 81.

against Kempf, and awarded Kempf attorney fees and costs totaling $9,271.38.[17] The court denied Young's motion for reconsideration on September 3, 2013.[18]

ANALYSIS

Standard of Review

We review an order of summary judgment de novo and determine whether the supporting materials, viewed in the light most favorable to the nonmoving party, demonstrate "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); Hartley v. State, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). The moving party under CR 56 can satisfy its initial burden by demonstrating the absence of evidence supporting the nonmoving party's case. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989). The burden then shifts to the nonmoving party to set forth specific facts demonstrating a genuine issue for trial. Kendall v. Public Hosp. Dist. No. 6, 118 Wn.2d 1, 8-9, 820 P.2d 497 (1991). A "'complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'" Young, 112 Wn.2d at 225 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

Young contends that Kempf had a duty to transfer the IRA account to him on request because his interest in the account "vested" upon entry of the dissolution

---

[17] CP at 116-17.
[18] CP at 105.

decree.[19] He relies on the general principle that a dissolution decree "operates not only to vest in the spouse designated the property awarded to him or her, but to divest the other spouse of all interest in the property so awarded, except as the decree may otherwise designate." United Benefit Life Ins. Co. v. Price, 46 Wn.2d 587, 589, 283 P.2d 119 (1955), overruled on other grounds by Aetna Life Ins. Co. v. Wadsworth, 102 Wn.2d 652, 689 P.2d 46 (1984).

But contrary to Young's contentions, the trial court correctly recognized that the general principle set forth in Price addresses only the respective property rights of the parties before the court in the dissolution proceeding. See Price, 46 Wn.2d at 588-89. Neither below nor on appeal has Young identified any authority or legal theory suggesting that the dissolution decree imposed an obligation on third parties to transfer property before entry of the QDRO. Because the challenged withdrawal occurred before entry of the QDRO, Young failed to demonstrate that Kempf's actions were improper. The trial court properly entered summary judgment dismissing Young's claims against Kempf.

For the first time on appeal, Young contends that there are material factual issues as to whether Kempf supplied "false information"[20] under a theory of negligent misrepresentation. Because Young neither pleaded nor argued this claim to the trial court, we decline to consider it for the first time on appeal. See Sourakli v. Kyriakos, Inc., 144 Wn. App. 501, 509, 182 P.3d 985 (2008); see also RAP 9.12 ("On review of an

---

[19] Br. of Appellant at 6.
[20] Br. of Appellant at 8.

order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.").

Young also contends that the trial court erred in awarding Kempf attorney fees. RCW 4.84.250 authorizes an award of attorney fees in actions in which "the amount pleaded" is $10,000 or less. A defendant is the "prevailing party" under RCW 4.84.250 if the plaintiff "recovers nothing." RCW 4.84.270; see AllianceOne Receivables Mgmt., Inc. v. Lewis, 180 Wn.2d 389, 395, 325 P.3d 904 (2014).

Young asserts that he "prevailed" on his separate cause of action for an accounting because Kempf supplied an accounting and that Kempf prevailed on the action for a money judgment. Because both parties prevailed, Young maintains that neither party was entitled to an award of attorney fees.

Young initially filed a complaint for account disclosure and sought a judgment compelling a written accounting. The court made no ruling on the allegations in the complaint. Young amended the complaint to request only a monetary judgment for Kempf's alleged mishandling of the funds in the IRA account. The trial court dismissed all of Young's claims against Kempf and entered a judgment solely in Kempf's favor. Young did not prevail in a separate cause of action, and he recovered nothing. The trial court properly awarded attorney fees under RCW 4.84.250.

As the prevailing party, Kempf is also entitled to an award of attorney fees on appeal. RCW 4.84.290; see RCW 4.84.250. We grant Kempf's request and award reasonable attorney fees on appeal, subject to compliance with RAP 18.1(d).

Affirmed.

Trickey, J

WE CONCUR:

Spearman, C.J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAMES YOUNG, Appellant, v. SEI PRIVATE TRUST COMPANY, a foreign corporation and R. AUGUST KEMPF, dba Kempf and Company, Respondents, and T.D. AMERITRADE, a corporation, Defendant.	No. 70922-4-I DIVISION ONE UNPUBLISHED OPINION FILED: September 22, 2014

TRICKEY, J. — In order to defeat a supported motion for summary judgment, the nonmoving party must demonstrate a genuine factual issue as to every element of the case. Appellant James Young failed to make any showing that respondent R. August Kempf improperly disbursed funds from an investment account. Consequently, the trial court properly dismissed Young's claims against Kempf on summary judgment. Because Kempf was the prevailing party in an action alleging damages of $10,000 or less, the trial court did not err in awarding reasonable attorney fees under RCW 4.84.250. We affirm.

FACTS

The material facts are not disputed. James Young and Billi Dunning dissolved their marriage on March 23, 2012.[1] The dissolution decree awarded Dunning's

---

[1] Clerk's Papers (CP) at 67.

individual retirement account (IRA) to Young.[2] SEI Private Trust Company (SEI) was the IRA plan administrator. R. August Kempf is the president of Kempf & Company (collectively Kempf), which managed Dunning's IRA account.[3]

Young alleges that at some unspecified date after the dissolution, he provided SEI with a copy of the decree and "personally notified Kempf of [the award of the IRA] and asked that it be transferred directly to me so that no further trades could be made by my wife."[4] Young also requested a detailed accounting of the transactions for the year 2012.[5]

On September 10, 2012, Dunning withdrew $3,500 from the IRA.[6] On September 19, 2012, the dissolution court entered a qualified domestic relations order (QDRO) granting Young, as the alternate payee, "the right to receive 100% of the Participant[Dunning's] account under the Plan as of the date of distribution (date it is transferred to the Alternate Payee)."[7] The QDRO directed that payment be made to Young "as soon as practicable" after service of the order on SEI.[8] On September 25, 2012, SEI distributed the balance of the IRA, $46,778.72, to Young and closed the account.[9]

---

[2] CP at 118.
[3] CP at 20.
[4] CP at 118.
[5] CP at 119.
[6] CP at 27.
[7] CP at 85.
[8] CP at 85.
[9] CP at 28-29.

On March 26, 2013, Young filed a complaint for account disclosure against Kempf, requesting an accounting for the IRA.[10] Kempf provided Young with a complete accounting in April 2013.[11]

On May 24, 2013, Young filed an amended complaint, alleging that he was entitled to an additional $3,903.00 from the IRA because Kempf and SEI had disbursed the amount even though they had "actual and constructive knowledge that the particular account was the property of Plaintiff." Young asked for the entry of a judgment in this amount against Kempf and for an award of reasonable attorney fees and costs.[12]

Kempf moved for summary judgment.[13] During the course of the motion hearing on August 9, 2013, Young suggested that Kempf had improperly disbursed $3,500 to Dunning because he had already received notice of the QDRO.[14] The trial court continued the hearing to permit the parties to provide the details about the QDRO, which was not in the record before the court.[15]

When the hearing resumed on August 23, 2013, neither Young nor his counsel appeared.[16] The trial court granted summary judgment, dismissed all of Young's claims

---

[10] CP at 1. The complaint also named "Ameritrade" as a defendant. Young's claims against Ameritrade are not part of this appeal.
[11] CP at 46.
[12] CP at 3-4.
[13] CP at 15.
[14] Report of Proceedings (RP) at 22.
[15] RP at 25.
[16] CP at 81.

against Kempf, and awarded Kempf attorney fees and costs totaling $9,271.38.[17] The court denied Young's motion for reconsideration on September 3, 2013.[18]

ANALYSIS

Standard of Review

We review an order of summary judgment de novo and determine whether the supporting materials, viewed in the light most favorable to the nonmoving party, demonstrate "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); Hartley v. State, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). The moving party under CR 56 can satisfy its initial burden by demonstrating the absence of evidence supporting the nonmoving party's case. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989). The burden then shifts to the nonmoving party to set forth specific facts demonstrating a genuine issue for trial. Kendall v. Public Hosp. Dist. No. 6, 118 Wn.2d 1, 8-9, 820 P.2d 497 (1991). A "'complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'" Young, 112 Wn.2d at 225 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

Young contends that Kempf had a duty to transfer the IRA account to him on request because his interest in the account "vested" upon entry of the dissolution

---

[17] CP at 116-17.
[18] CP at 105.

decree.[19] He relies on the general principle that a dissolution decree "operates not only to vest in the spouse designated the property awarded to him or her, but to divest the other spouse of all interest in the property so awarded, except as the decree may otherwise designate." United Benefit Life Ins. Co. v. Price, 46 Wn.2d 587, 589, 283 P.2d 119 (1955), overruled on other grounds by Aetna Life Ins. Co. v. Wadsworth, 102 Wn.2d 652, 689 P.2d 46 (1984).

But contrary to Young's contentions, the trial court correctly recognized that the general principle set forth in Price addresses only the respective property rights of the parties before the court in the dissolution proceeding. See Price, 46 Wn.2d at 588-89. Neither below nor on appeal has Young identified any authority or legal theory suggesting that the dissolution decree imposed an obligation on third parties to transfer property before entry of the QDRO. Because the challenged withdrawal occurred before entry of the QDRO, Young failed to demonstrate that Kempf's actions were improper. The trial court properly entered summary judgment dismissing Young's claims against Kempf.

For the first time on appeal, Young contends that there are material factual issues as to whether Kempf supplied "false information"[20] under a theory of negligent misrepresentation. Because Young neither pleaded nor argued this claim to the trial court, we decline to consider it for the first time on appeal. See Sourakli v. Kyriakos, Inc., 144 Wn. App. 501, 509, 182 P.3d 985 (2008); see also RAP 9.12 ("On review of an

---

[19] Br. of Appellant at 6.
[20] Br. of Appellant at 8.

order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.").

Young also contends that the trial court erred in awarding Kempf attorney fees. RCW 4.84.250 authorizes an award of attorney fees in actions in which "the amount pleaded" is $10,000 or less. A defendant is the "prevailing party" under RCW 4.84.250 if the plaintiff "recovers nothing." RCW 4.84.270; see AllianceOne Receivables Mgmt., Inc. v. Lewis, 180 Wn.2d 389, 395, 325 P.3d 904 (2014).

Young asserts that he "prevailed" on his separate cause of action for an accounting because Kempf supplied an accounting and that Kempf prevailed on the action for a money judgment. Because both parties prevailed, Young maintains that neither party was entitled to an award of attorney fees.

Young initially filed a complaint for account disclosure and sought a judgment compelling a written accounting. The court made no ruling on the allegations in the complaint. Young amended the complaint to request only a monetary judgment for Kempf's alleged mishandling of the funds in the IRA account. The trial court dismissed all of Young's claims against Kempf and entered a judgment solely in Kempf's favor. Young did not prevail in a separate cause of action, and he recovered nothing. The trial court properly awarded attorney fees under RCW 4.84.250.

As the prevailing party, Kempf is also entitled to an award of attorney fees on appeal. RCW 4.84.290; see RCW 4.84.250. We grant Kempf's request and award reasonable attorney fees on appeal, subject to compliance with RAP 18.1(d).

Affirmed.

Trickey, J

WE CONCUR:

Spearman, C.J.