

68636-4

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No. 68636-4-1

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

HYON PAK and TAM BUI,

Appellants,

v.

DOMINIC and CHANG SHIM,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

The Honorable Sharon S. Armstrong

BRIEF OF RESPONDENTS

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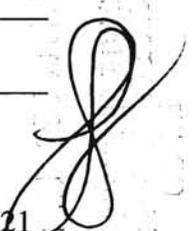


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I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. Respondents deny the errors as assigned by the Appellants.

B. Statement of Issues for Appellants' Assignments of Error

1. Did the Court err when it found Appellants liable for legal malpractice and in breach of fiduciary duties?

Appellants' Assignment of Error 1&2

2. Did the Court err in finding Appellants liable for conversion of funds and for fraud?

Appellants' Assignment of Error 1&2

3. Did the Court err in denying Appellants' motion to dismiss on the grounds of real party in interest and including the proceeds from the sale of College Mart in the net recovery?

Appellants' Assignment of Error 1&2

4. Did the Court err in admitting evidence on the record and including the amounts in the net recovery after further verification during trial?

Appellants' Assignment of Error 1&2

5. Did the Court err in denying Appellants' Motion for Reconsideration?

Appellants' Assignment of Error 2

II. STATEMENT OF THE CASE

A. Procedural History

Dominic Shim and Chang Shim, Respondents, filed suit in Snohomish County Superior Court on February 17, 2010 based on several complicated business deals between the parties. CP 13 – 26. Because Appellant Tam Bui is a Judge in Snohomish County, on May 4, 2010, the parties entered a stipulation to transfer the case to King County. CP 3-5. This action came for bench trial on December 19, 2011 before the Honorable Judge Sharon S. Armstrong. RP 1. Judgment was found in favor of the Respondents on March 20, 2012 in the amount of \$520,972.00. RP 88. On March 29, 2012, the Appellants filed a Motion for Reconsideration which was denied on April 11, 2012. CP 102-112. The Appellants filed a Notice of Appeal in Division One on April 18, 2012. CP 113-114.

B. Statement of the Facts

Dominic Shim initially hired Appellant Pak as an attorney in a DUI matter in 2003. RP 25-26. Subsequently, Appellant Pak entered into joint ventures with Mr. Shim while engaging in an ongoing attorney-client relationship from 2003 to 2007. RP 25-27.

To partake in these joint ventures, Mr. Shim refinanced his home for his portion of the investment fund. RP 35. The investment fund was

supposed to go into a trust account under RAVE Kids Trust. The numerous transactions include the purchase of a promissory note, real property, stock, creation of a trust, a home equity line of credit, and the purchase of a boat. Although the Rules of Professional Conduct (RPC) do not permit attorneys from engaging in business transactions with their clients, Appellant Pak never gave Mr. Shim a waiver or any documentation showing that he was not acting in an attorney capacity. RP 343. In 2007, Appellant Pak also acted as the escrow agent in the sale of Mr. Shim's store, College Mart.

Due to the complicated nature of each transaction, they will be addressed separately.

1.) Purchase of the \$63,263.00 Promissory Note

Appellant Pak's purchased a promissory note on February 2, 2007. RP 186. Mr. Shim discovered the opportunity to purchase the note and thought he became a joint investor on the note after the Appellant Pak's verified that the note was good. RP 191. The note was supposed to be purchased under the RAVE Kids Trust; however, Appellant Pak purchased the note under his name only. RP 81.

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2.) *Purchase of the Kingston Property*

On February 15, 2007, the parties purchased property at 24480 Jefferson Place NE, 98246 [hereinafter Kingston Property]. RP 43. The Warranty Deed listed the RAVE Kids Trust as Grantors, in which Mr. Shim and Appellant Pak were equal owners. CP 93. Appellants' counsel states that it was Appellant Pak's responsibility to maintain the Kingston Property; however, the Court determined that both parties were jointly required to maintain the property. AB 6, CP 94. Further, Appellants' counsel emphasized that the Kingston Property is Mr. Shim's property. RP 406, 219. When the Court inquired whether the Appellant Pak was willing to dissolve the Trust and transfer the house and boat back to Mr. Shim, the affirmation was clear. RP 406.

3.) *Creation of RAVE Kids Trust*

RAVE Kids Trust was created to purchase the Kingston Property. RP 43. Appellant Pak drafted the RAVE Kids Trust Agreement for Mr. Shim to sign. CP 92. In drafting the RAVE Kids Trust Agreement, Appellant Pak named Mr. Shim and himself as the Settlers and Beneficiaries and as the Trustees. CP 92. Appellant Pak drafted the Trust Agreement without a clear knowledge of trust documentation and tax liabilities. RP 319,384. Appellants'

counsel states that the RAVE Kids Trust never had a bank account since it was created for Mr. Shim's use. Instead the parties used Appellant Pak's Washington Mutual [hereinafter WAMU] account, which Mr. Shim was added later to on the account. Furthermore, Mr. Shim's testimony was that Appellant Pak had advised him that making a bank account in another individual's name was better. RP 42.

4.) Home Equity Line of Credit

Appellant Pak opened a Chase home equity line of credit [hereinafter HELOC] in Mr. Shim's name only in the amount of \$450,000. Mr. Shim was unaware that the HELOC was in his name only. RP 49. Appellant Pak withdrew a portion of the funds and transferred them into his personal WAMU account. Mr. Shim never had his own WAMU account. RP 58. Appellants' counsel states that Appellant Pak only withdrew funds for the benefit of Mr. Shim. This is incorrect. The Findings of Fact determined that \$275,000 was transferred into Appellant Pak's individual account without the consent of the Mr. Shim. CP 94.

5.) Purchase of Etelos Stock

When parties invested in Etelos, Inc. [hereinafter Etelos], Mr. Shim was under the impression that the stocks would be purchased

in RAVE Kids Trust. RP 349-50. Appellant Pak did not disclose that the stock purchase was to be only in his name due to RAVE Kids Trust being an accredited investor. RP 347. Mr. Shim was unaware that there was a restriction on the stock wherein it could not be transferred for 12 months. There were no disclosure documents, and no documents to establish that Mr. Shim knew of the restriction on transfer or sale of the shares for 12 months. CP 95.

6.) Purchase of 1993 Bayliner

The parties purchased a 1993 Bayliner boat on June 1, 2007. RP 82-3.

7.) Sale of College Mart & Laundromat

Around September 2007, Mr. Shim retained the Appellant Pak to be the escrow agent for the sale of College Mart. RP 91. Acting in the capacity of an escrow agent, Appellant Pak took possession of two promissory notes issued by the buyer of College Mart totaling \$41,335.02. RP 92. On October 4, 2007, College Mart was sold and Mr. Shim's net proceeds were \$303,389.83. The entire amount of the net proceeds Appellant Pak took into his possession and failed to deliver to Mr. Shim. RP 99. The real property upon which College Mart sat was sold and Mr. Shim's net proceeds

were \$176,982.55. The entire amount of the net proceeds Appellant Pak took into his possession and failed to deliver to Mr. Shim. RP 99. The Findings of Facts conclusively determined that Appellant Pak failed to obtain escrow instructions, failed to negotiate an escrow fee, failed to deposit the funds in a trust account and failed to make a timely account of the proceeds. CP 97. Appellant Pak continually refused to transfer the funds from the proceeds of the sale. CP 97.

III. LEGAL ARGUMENT

A. The applicable standard of review for the case at bar is abuse of discretion.

The Court of Appeals reviews a trial Court's fact-based ruling for abuse of discretion. *State v. Nemitz*, 105 Wn. App. 205, 19 P.3d 480 (Div.3 2001). An abuse of discretion is "plain error, discretion exercised to an end that is not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found.", *Wing v. Asarco, Inc.*, 114 F.3d 986, 988 (9th Cir. 1997), *Int'l Jensen, Inc., v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir. 1993). "When reviewing for abuse of discretion, [this Court] cannot reverse unless [it has] a 'definite and firm conviction that the court below committed a clear error of judgment

in the conclusion it reached upon a weighing of the relevant factors.” *supra. Smith v. Jackson*, 84 F.3d 1213, 1221 (9th Cir. 1996). The Court has abused its discretion when it made an error of law, or rested its determination on a clearly erroneous finding of fact. *United States v. Sherburne*, 249 F.3d 1121 (9th Cir. 2001). Additionally, this Court should not reverse a district court decision for abuse of discretion unless it is firmly convinced that “the reviewed decision lies beyond the pale of reasonable justification under the circumstances.” *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000). This Court should not reverse the trial Court’s decision simply because it would have reached a different result. *Silber v. Mabon*, 18 F.3d 1449, 1455 (9th Cir. 1994); *Marx v. Loral Corp.*, 87 F.3d 1049, 1054 (9th Cir. 1996) (the district court had not abused its discretion; although its analysis was “considerably lenient to the plaintiffs,” it was not a “clear error of judgment.”). There is no reason to abandon this well established standard in the case at bar.

Appellants mislead the Court with their assertion of the standard of review. Substantial evidence is based upon the notion that the trier of fact is in the best position to decide factual issues. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959). If the case at hand offered sparse evidence to the trier of fact, then perhaps this standard would apply here. However, the findings are amply sustained by the proof

offered both into the record and at trial. Close to a 160 exhibits were entered into the record as exhibits at trial in conjunction with the testimony of four witnesses. CP 73-87. The evidence offered by Mr. Shim was sufficient to persuade Hon. Judge Armstrong to enter the Facts of Finding and Conclusions of Law and the Judgment. Thus the applicable standard for review is abuse of discretion.

B. The trial Court correctly concluded that there existed a violation of the Appellant Pak's obligation as an attorney, resulting in a breach of fiduciary duty toward Mr. Shim.

Appellant Pak attempts in vain to argue that there was no breach of fiduciary duty because the parties never established an attorney-client relationship; however, this is a meritless claim. The relationship of an attorney to his client is one of the strongest fiduciary relationships known to law. Further, because it is regarded as one of special trust and confidence, the law requires the dealings to be in the upmost fairness and good faith. The evidence clearly indicates that the premise of the relationship was a legal one. Mr. Shim testifies that upon a recommendation from a friend, he hired the Appellant Pak to help him with a legal matter. RP 25-26. Further, Mr. Shim clarified that part of the reason why he hired Appellant Pak was because "Tam Bui used to be a

prosecutor at the district court I was supposed to have a hearing at. So I hired them, as uh, hired to represent me.” RP at 26.

As a matter of public policy, the legal profession is scrutinized in the highest measure because public interest is paramount. There is no vested right in an individual to practice law. Rather, it is the court that has the right to protect itself and as an extension, protect society, as an instrument of justice.

Appellant Pak was disbarred from the Washington State Bar Association on July 22, 2010. The Discipline notice included violations of RPC’s for competence, diligence, unauthorized practice of law, conduct prejudicial to the administration of justice, violation of the RPCs, declining or terminating representation, and misconduct involving disbarred, suspended, resigned or inactive lawyers. The trial Court was considerate of Appellant Pak’s disbarment. The trial Court mindfully took judicial notice of the Appellant Pak’s disbarment, in consideration that “your spouse might make political contributions and as a judge you’d get in trouble.” RP 163. However, the trial Court, by no means, vindicated the Appellant Pak of his liabilities and found him liable for fraud, conversion, breach of fiduciary duty, and violation of his obligations as an attorney.

Appellants' counsel attempts to argue that lack of documentation, accounting and proof indicate that there was no attorney-client relationship. AB 29. However, Washington courts have frequently held that lawyers who fail to maintain complete records and fail to account and deliver funds as requested are reminded that disbarment is the usual result. *Supra In re Hall*, 73 Wn.2d 401, 438, P.2d 874 (1968); *In re Anderson*, 73 Wn.2d 587, 439 P.2d 981 (1968); *In re Soderquist*, 78 Wn.2d 227, 472 P.2d 395 (1970); *In re Garvin*, 78 Wn.2d 832, 479 P.2d 930 (1971); *In re Kirchen*, 83 Wn.2d 727, 522 P.2d 188 (1974).

The trial Court questioned "is there anything that documents that he told Shim and Shim understood, I'm not operating as a lawyer. We're doing this as friends?" RP 174. Under the RPC, an attorney is not allowed to go into business with their clients. RP 343. RPC 1.8(a) is explicit, "a lawyer shall not enter into a business transaction with a client unless the client gives informed consent, in writing signed by the client, to the essential terms of the transactions." In the many transactions that transpired between the parties, Appellant Pak never drafted a waiver or any other document indicating the Mr. Shim's consent. RP 343. Thus, the trial Court's finding that Appellant Pak violated his obligations as an attorney by entering into joint investments without waivers is supported by Appellant Pak's own testimony. More egregiously, Appellant Pak testified

that in 2007, he was not acting in the capacity of Mr. Shim's attorney. RP 326. However on cross examination, Appellant Pak admitted that he was indeed representing Mr. Shim in May of 2007. RP 327. Thus, Appellant's argument that an attorney-client relationship did not exist is erroneous. AB 30-32. As the trial Court's finding of fact is sufficiently supported by the Appellant's own testimony, there is no abuse of discretion and the trial Court's ruling should be upheld.

Appellants' counsel asserts that the determination of an attorney breaching his duty of care requires expert testimony to that effect. However, Appellant Pak has been disbarred and suspended twice prior to that. During trial, Appellants brought forth the same objection. The Court sufficiently addressed the objection indicating that while a medical malpractice case would necessitate an expert, in a legal malpractice case, it is not always required. RP 160-70. Appellant Pak never provided waivers for any conflict of interests he may have had entering into business transactions with Mr. Shim as required by RPC 1.8(a). RP 343. Therefore, there was no abuse of discretion by the trial Court and the appeal should be denied.

- C. The trial Court correctly concluded that the Appellant Pak engaged in conversion of funds.

Appellants wrongly argue that no conversion was committed because Appellant Pak never interfered with Mr. Shim's possession of his property or access to his funds. AB 14. Money is the subject of conversion when it has either been wrongfully received by the party charged with conversion or unless such party was under obligation to return the specific money to the party claiming it. *Supra* note *Pub. Util. Dist. No. 1 of Lewis County v. Wash. Pub. Power Supply Sys.*, 104 Wn.2d 353, 378 (1985). Appellant Pak's failure to return the specified money to Mr. Shim is the basis for the Court's determination that Appellant Pak engaged in conversion of funds.

i. **College Mart**

In the proceeds of the sale of College Mart, the trial Court appropriately found Appellant Pak liable for conversion. The trial Court found Appellant Pak interfered with Mr. Shim's right to possession of the proceeds from the promissory notes and proceeds of the sale of College Mart. CP 100. When Mr. Shim inquired about the proceeds from the sale, Appellant Pak refused to respond, "He didn't answer. Just be quiet. I don't know what he did with my College Mart sales money." RP 97. Appellant Pak later testifies that he took the proceeds from the sale of College Mart comingling the funds with the investment funds for the joint investments. RP 262. The two promissory notes and the principle amount of the sale

were all in checks made payable to Mr. Shim. RP 365. It is the duty of the escrow agent, to hold the proceeds until the transaction was ready to close. However, after the transaction was ready to close, Appellant Pak, as escrow agent, was under obligation to return the funds to Mr. Shim. Appellant Pak failed to fulfill this obligation. As the trial Court's finding of conversion was supported by the evidence proffered at trial indicating Appellant Pak's failure to return the funds, there is no abuse of discretion. The Court's ruling finding Appellant Pak liable for conversion of the College Mart funds should be affirmed.

ii. **Home Equity Line of Credit**

The trial Court correctly found Appellant Pak liable for conversion of the HELOC funds when he transferred \$275,000 of the funds from the joint account into his personal account without Mr. Shim's consent. CP 99. Appellant Pak knowingly applied for and received a line of credit allegedly to pay off the mortgage of the Kingston Property under Mr. Shim's name only. RP 338. However, Appellant Pak withdrew \$275,000 and deposited it into his own personal WAMU account. RP 339. Appellants mistakenly allege that the funds were deposited into a joint account to which both parties had access however, that allegation is contradictory to Appellant Pak's testimony. AB 22. Appellant Pak

withdrew and deposited \$275,000 into his personal account for his own benefit. RP 339. Appellant Pak did not return the funds received from the HELOC to Mr. Shim, thus, interfering in Mr. Shim's access, possession, and right to the funds. The trial Court did not abuse its discretion when it found Appellant Pak liable for conversion of the funds.

D. The trial Court's determination of Appellant Pak's liability for fraud was accurate.

Appellants' counsel alleges the elements of fraud were unmet; however, the lower Court correctly found Appellant Pak liable for fraud. The elements of fraud are: 1.) a representation of existing fact; 2.) the fact is material; 3.) the fact is false; 4.) the defendant knew the fact was false or was ignorant of its truth; 5.) the defendant intended the plaintiff to act on the fact; 6.) the plaintiff did not know the fact was false; 7.) the plaintiff relied on the truth of the fact; 8.) the plaintiff had a right to rely on it; and 9.) the plaintiff had damages. *Baddeley v. Seek*, 138 Wn. App. 333,338-9, 156 P.3d 959 (2007). AP 17.

i. **College Mart**

In the sale of College Mart, the trial Court found Appellant Pak liable for fraud for his failure to deliver lawful possession of the proceeds and promissory notes from the sale of College Mart and the real estate upon which the business was located. CP 100. The Conclusions of Law

7(b) states “Plaintiff Shim relied on the fact that as escrow agent Defendant Pak would deliver lawful possession of the proceeds of the proceeds from the promissory notes and proceeds from the sale of College Mart and the real estate upon which the business was located.”. Conclusions of Law 7(b) satisfies elements 1, 2, 6, 7, and 8. CP 100. Conclusions of Law 7(c) finds “Defendant Pak failed to deliver lawful possession of the proceeds from the promissory notes and proceeds from the sale of College Mart and the real estate upon which the business was located,” which satisfies the 3rd and 4th element. CP 101. Conclusions of Law 7(d) states, “Defendant Pak intended Plaintiff Shim to act on his representation as escrow agent on the sale of College Mart,” this satisfies the elements 6 & 7. CP 101. Conclusions of Law 7(e) states, “Plaintiff Shim did not know that Defendant Pak would fail to deliver lawful possession of the proceeds from the promissory notes and proceeds from the sale of College Mart and the real estate upon which the business was located,” which satisfies elements 3, 7, and 8. CP 101. Conclusions of Law 7(h) found “Plaintiff Shim suffered a financial loss when he was denied his legal right to the proceeds of the sale of College Mart in the amount of totaling \$521,707.40” which satisfies the 9th element. CP 101. The trial Court applied the appropriate law for fraud and through trial took into account evidence to support each element of fraud.

Appellant Pak represented that he would act as his escrow agent yet failed to deliver the proceeds from the sale. RP 395. Appellants mistakenly assert that Appellant Pak fulfilled his duty as an escrow agent. AB 18. However, his duty was to transfer the proceeds to Mr. Shim, especially when Mr. Shim demanded the proceeds from the sale as soon as possible. RP 105. The trial Court found that Appellant Pak failed to obtain written escrow instructions, failed to negotiate an escrow fee, failed to deposit the funds in a trust account and failed to make a timely accounting of the proceeds. CP 101. Therefore, Appellants' argument for lack of fraud fails and the trial Court's finding should be affirmed. Because the Findings of Fact and Conclusions of Law are supported by the evidence, the trial Court did not abuse its discretion.

ii. Home Equity Line of Credit

The trial Court accurately found Appellant Pak liable for fraud in the Washington Mutual HELOC for transferring funds of \$275,000 to his personal account from the joint account without Mr. Shim's consent. CP 99. Appellants' discussion of fraud revolves around Mr. Shim's knowledge of the creation of the HELOC. AB 23. However, the trial Court specifies that the fraud was for Appellant Pak's transferring of funds into his personal account, not creating the HELOC. Appellant Pak removed \$275,000 and deposited it into his personal account. RP 339. Mr.

Shim was unaware of the withdrawal. RP 61. Therefore, the trial Court's Findings of Fact and Conclusion of Law finding Appellants liable for fraud was not an abuse of the discretion; thus, the trial Court's ruling should be upheld.

E. The trial Court was acting within its discretion in permitting recovery for the proceeds of the sale of College Mart.

Appellants' counsel relies heavily on *Zimmerman v. Kyte* as their basis for the contention that a shareholder cannot bring suit for injury to the corporation. *Zimmerman v. Kyte*, 53 Wn. App. 11, 765 P.2d 905 (1988). However, this case can be distinguished from the action at hand primarily due to the timing of the objection. *Zimmerman* is a suit in which shareholders brought an action as the corporate entity for tortious contractual interference. *Id.* Within 5 months from the commencement of the action, Defendant challenged the suit based on the grounds that shareholders could not sue as the corporate entity, resulting in the substitution of the individuals as Plaintiffs. *Id.* at 12. Furthermore, in this case, the Defendant relied on the transfer from the corporation to the individuals in order to obtain a dismissal. *Id.* at 13. The *Zimmerman* court found that a party cannot use theories or arguments to his advantage at trial and then argue on appeal that they were erroneously accepted. *Id.*

Furthermore, the Court found that the Defendants were attempting to obtain a double benefit and applied the theory of *res judicata*. *Id* at 15.

In the case at hand, the Appellants did not bring the objection until the middle of the first day of trial. The applicable rule is CR 17. CR 17(a) says in pertinent part:

“Every action shall be prosecuted in the name of a real party in interest...a party with whom or in whose name a contract has been made for the benefit of another or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought. No action shall be dismissed on the grounds that it is not prosecuted in the name of the real party in interest.”

Because CR 17(a) is identical to Federal Rule of Civil Procedure 17(a), federal court interpretations of the corresponding federal rules are persuasive authority for interpreting the state rule. *Carle v. Earth Steve, Inc.*, 35 Wn. App. 904, 907, 670 P.2d 1086 (1983). CR 17(a) is designed to expedite litigation, *not* to afford a technical shield whereby a trial on the merits can be avoided. *Supra* note *Fox v. Sackman*, 22 Wn. App. 707, 591 P.2d 855 (1979); *In re Estate of Crane*, 9 Wn. App. 853, 515 P.2d 552, *In re Estate of Boyd*, 5 Wn. App. 32, 485 P.2d 469 (1971). Furthermore, an action cannot be dismissed on real party in interest grounds until a reasonable amount of time has been provided to permit the real party in interest to litigate. *Whelan v. Abell*, 953 F.2d 663, 673, 672 (D.C. Cir.

1992). Appellants cannot raise a CR 17(a) defense for real party in interest without giving the “real party” an opportunity to join the action. The defense must be brought forth with reasonable promptness, not the day of trial. Further, courts have found that where a CR 17(a) defense is made, judges abuse their discretion in allowing the plea as late as the start of the trial if the real party has been prejudiced by the defendant's laxness. *Id* at 674. See also, *Gogolin & Stelter v. Karn's Auto Imports, Inc.*, 886 F.2d 100, 102-03 (5th Cir.1989) (Rule 17(a) defense waived when made at the close of the plaintiff's evidence); *Hefley v. Jones*, 687 F.2d 1383, 1388 (10th Cir.1982) (defense waived when made sixteen days before trial)).

Appellants' counsel made the motion to dismiss under CR 17(a) well into the first day of trial. RP 167. The trial Court considered the implications of the motion to dismiss based on the grounds of real party in interest, and denied the motion. RP 170. Additionally, by the time this action was brought before the Court, the corporate entities had long ago dissolved. The trial Court took into consideration the fact that the entities no longer exist meaning that an action on behalf of the corporation cannot be brought. RP 170. Appellant Pak testified that the proceeds from the sale of College Mart were made out to Mr. Shim, personally. RP 365. Appellant Pak was remiss in his untimely motion and should not be discharged of his liability. Appellant Pak had sufficient time prior to trial

to bring forth a motion to dismiss on grounds of real party in interest and failed to do so.

The trial Court's ruling in denying the Appellants' motion to dismiss was accurate. Therefore, the trial Court did not abuse its discretion in including the recovery from the proceeds of College Mart in the net recovery.

Appellant Pak would not be prejudiced because had the corporate entity, College Mart, been joined in the suit – in fact, the result would have been the same. Appellant Pak's failure to return the proceeds of the sale from College Mart would not have changed. Appellant Pak's conversion of the funds from the sale of College Mart would not have changed. Appellant Pak's breach of fiduciary duty as Mr. Shim's attorney would not have changed. Therefore, the trial Court did not abuse its discretion in including the proceeds from the sale of College Mart in the calculation of the recovery.

F. The trial Court did not abuse its discretion in admitting evidence into the record and including the amounts in the recovery.

Appellant Pak contends that the two Key Bank checks admitted into evidence should not have been admitted into the court record and subsequently included in the recovery. AP 36-37. Appellant Pak raised

the same objections during trial and the Court sufficiently addressed this issue upon Appellants' counsel's objection. The Court permitted the check into evidence because "it is incomplete because the dollar amount is not visible. However it appears to be endorsed by Mr. Pak." RP 35. On the second check, the Appellants' counsel, again, attempted to object on the basis that the check is incomplete. The Court admitted it into evidence stating, "Well, I can read the dollar amount and I can also read the payee on this document." RP 37.

The Court had both checks in front of her and despite Appellants' objections permitted the evidence to be entered. The two blank checks are two of four checks issued in the same amount, to the same payee, from the refinancing of the Mr. Shim's house. RP 34. Further, while the Appellant Pak attempts to make the argument that the dollar amount of the check was not visible; the Court was easily able to see the dollar amount and the payee and on such grounds permitted the evidence. Furthermore, the amount of the "blank" check is further verified by the reverse side of the check stating, "...we have issued our cashier's check no. 732973402 to the same payee and in the same amount as is shown on the paid, uh, side of this check." RP 37.

Furthermore, Appellants wrongly contend that the two checks were admitted conditionally upon other testimony or evidence as to the value of

each check. AP 36-37. As to the value of the checks, Mr. Shim testifies that the amount of the check was the same for all four checks issued, \$79,000. RP 35. Appellant Pak, too, testified regarding the two incomplete checks, testifying as to the amounts, that he held the checks, and deposited them into his account. RP 185-86. The trial Court examined the checks and listened to the testimony and then admitted them as evidence. Admissibility of evidence falls within the sound discretion of the trial Court. *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992). There was no abuse of discretion in permitting the checks into evidence. The trial Court's ruling permitting the checks into the record and in the net recovery should be upheld.

G. The trial Court did not err in denying Appellants' Motion for Reconsideration.

The ruling on the motions for reconsideration is within the discretion of the trial court and is reversible by an appellate court only for a manifest abuse of discretion. *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989); *Perry v. Hamilton*, 51 Wn. App. 936, 938, 756 P.2d 150 (1988). The Appellants do not allege an abuse of discretion in the Order denying the Motion for Reconsideration. AP 40. The Court was acting within its discretion in its refusal to grant the Motion for

Reconsideration as there were no new issues to be considered and where there was no error in assessment of the amount of recovery.

IV. CONCLUSION

First, the trial Court did not err in the Findings of Facts and Conclusions of Law in finding Appellant Pak liable for conversion of funds, fraud, legal misrepresentation and breach of fiduciary duty. Secondly, the trial Court did not abuse its discretion as the Findings of Facts and Conclusions of Law were sufficiently supported by evidence and testimony by the parties at trial. Furthermore, there was not an abuse in discretion when the trial Court calculated the recovery to include the proceeds from the sale of College Mart. Finally, the trial Court did not abuse its discretion in denying the Appellant Pak's Motion for Reconsideration.

For the foregoing reasons, Respondents respectfully ask this Court to affirm the trial Court's Findings of Fact and Conclusions of Law and Judgment in favor of the Respondents and Respondents awarded their reasonable attorney fees incurred on appeal.

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RESPECTFULLY SUBMITTED this 25th day of October, 2012.

CHINN LAW OFFICES, PLLC

By:



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7 **IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
8 **DIVISION 1**

9 DOMINIC SHIM and CHANG SHIM

Case No. 68636-4-1

10 Respondents,

DECLARATION OF SERVICE

11 vs.

12 HYON PAK and TAM BUI, et al

13 Appellants.
14

15 I, Warren Chinn, am over the age of 18 years and not a party to the within action. I am
16 employed in the county of King, State of Washington. I declare under the penalty of perjury
under the laws of the State of Washington, that the below is true and correct.

17 On October 25, 2012, I served the following documents named below on the parties in
this action as follows:

18 DOCUMENT(S) SERVED: **BRIEF OF RESPONDENT**

19 SERVED UPON	<input checked="" type="checkbox"/> U.S. Mail	Russell M. Aoki
	<input type="checkbox"/> Facsimile	Kate E. Snow
	<input checked="" type="checkbox"/> Electronic Transmission	AOKI LAW, PLLC
	<input type="checkbox"/> Personal Service	720 Olive Way, Suite 1525
		Seattle, WA 98101
	<input type="checkbox"/> U.S. Mail	Court of Appeals, Division 1
	<input type="checkbox"/> Facsimile	One Union Square
	<input type="checkbox"/> Electronic Transmission	600 University Street
	<input checked="" type="checkbox"/> Personal Service	Seattle, WA 98101

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Warren Chinn