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STATE OF WASHINGTON

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No. 70922-4-I

In The Court of Appeals  
For The State of Washington  
Division I

JAMES YOUNG,

Petitioner

v.

SEI PRIVATE TRUST CO.,  
a Foreign Corporation and  
R. AUGUST KEMPT, dba  
KEMPT AND COMPANY,

Respondents.

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PETITIONER'S OPENING BRIEF

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## II. Statement of the Case

This appeal is from an Order of Summary Judgment Dismissing Petitioner's (Young) action for an accounting and Amended Complaint for a money judgment based upon that accounting, CPI, CP10, CP31.

On March 23, 2012, Young, and his then wife, Billie Dunning, were divorced and their property divided. In the decree, Young was awarded a stock account then in the name of Billie Dunning. CP1, CP 29, CP4, CP42.

The Billie Dunning account was managed by R. August Kempt. CP1. On the entry of the divorce decree, Young personally gave Kempt a copy of the decree and asked him to close the account so Billie Dunning could not continue trading in the account. CP42, CP39. Kempt was also asked to pay the balance of the account to Young. CP 42, CP39. In addition, Kempt was asked for an *accounting* for the calendar year of 2012. Kempt initially refused an accounting, but paid Young \$46,860.40 six months later, together with a statement in writing, which reflected a deductible charge of \$3,903.09, as one for "*change in account value.*" CP42. Despite continued requests for an explanation of this deduction by Young for a period of 18 months, none was forthcoming, until oral argument on a Motion for Summary Judgment by Kempt on July 12, 2013. CP19, CP60, CP 72.

Young initially commenced his action for an accounting because of a refusal by Kempt to explain the deduction of \$3,903.09 from the stock account. When the accounting was finally made by Kempt ( albeit unexplained satisfactorily ), Young filed an Amended Complaint seeking a money judgment for the \$3,903.09. CP1, CP10. The answer of

Kempt to the Amended Complaint was a Motion for Summary Judgment dismissing both causes of action by Young. CP19.

At oral argument on Kempt's Motion for Summary Judgment, the trial *judge refused to find that Young was legally vested* with the Billie Dunning SEI stock account, by the *entry of the divorce decree*. The Court believed a motion by Young for Reconsideration of certain parts of the Decree negated vesting of Billie Dunning's stock account. CP60, p. 4, l. 19:

The Court: It's not over till its over. So let's assume that there's a motion for reconsideration, then you've got a 30 day appeal period, right? During that 30 day appeal period, they appeal. It goes up to Division I, Division I reverses. But in the interim, they've already given the money to your client and he's spent it.

The Court disregarded the fact that the motion for reconsideration took only two weeks to complete, and no appeal was taken by either party. Instead, the trial judge ordered Young to go back to the *divorce court* and get the \$3,903.09 from his former wife. CP60, p. 16, l. 20; p. 16 l. 9 & 14.

Summary Judgment of dismissal was granted to Kempt and reconsideration was denied. CP37, 36. On motion for attorney's fees, the trial Court, refusing Young oral argument, awarded Kempt \$9,271.60. This appeal followed. CP37, 43.

### III. Argument

- A. LEGAL TITLE TO THE SEI ACCOUNT  
WAS VESTED IN YOUNG UPON THE  
ENTRY OF THE DIVORCE DECREE



The Court: And you said you want an accounting.

Mr. Stevenson: We wanted.....

The Court: In April this is what you got.

Mr. Stevenson: Yes.

In the meantime, Young filed an Amended Complaint seeking a money judgment for \$3,903.09 because it had not been paid by Kempt. CP10. At the time of Kempt's Motion for Summary Judgment of Dismissal of Young's Complaints, *there were two separate causes of action before the Court*. The Court, while acknowledging Young received an accounting, refused a money judgment based upon the fact that Billie Dunning had not transferred the stock account to Young until late September of 2012. CP42. The Court granted summary judgment and awarded \$9,271.38 in attorney's fees to Kempt. The award was reversible error under existing Washington law.

Neither party to a lawsuit is entitled to attorney's fees where each party *separately prevails* in the action. Muscek v. Equitable Sav. & Loan Assn., 25 WnApp2d 546, 171 P2d 856 (1946); Sardaun v. Mosford, 51 WnApp. 980, 756 P2d, 74 (1988); American Nursery v. Indian Wells, 115 WnApp2d 217, 797 P2d 477 (1990).

Muscek states the rule:

The established procedure in this jurisdiction in actions for accounting 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.

Young received an accounting from Kempt. The question of a *money judgment* was *separately* decided. CP 30, p. 8., l. 20. Young prevailed on the reception of an accounting

The trial Court should not have granted attorney's fees to Kempt in light of *Young prevailing on his accounting cause of action*. The Court abused its discretion on untenable grounds. State ex. rel. Caroll v. Junker, 79 WnApp2d 12, 26, 482 P2d 725 (1970); Muscek, *supra*.

C. KEMPT IS PERSONALLY LIABLE FOR  
SUPPLYING FALSE INFORMATION TO  
YOUNG REGARDING THE TRANSFER OF  
FUNDS FROM THE STOCK ACCOUNT

Kempt supplied false information to Young from March of 2012 to August of 2013 regarding the whereabouts of the \$3903.09. For those 17 months, Kempt insisted the \$3903.09 was *merely a "change in account value."* But at oral argument on Kempt's Motion for Summary Judgment, it was disclosed that the money was *transferred out of the stock account by Kempt to his client, Billie Dunning*, CP30, p. 12, l. 23:

The Court: On what authority did you transfer the money to him? (sic)

Mr. Noel: She signed – they, my understanding is that he (sic) signed – she signed a (sic) authorization to transfer the account to him...

Mr. Noel: *After September 10th*

The Court: And when after that date?

Mr. Noel: Yes.

The Court: What date did she do it? Do you know?

Mr. Noel: I don't know...

The Court: Are you saying that *prior to that date* there is a *withdrawal* in there?

Mr. Noel: *Yes of \$3500.*  
(Emphasis added.)

Despite the misrepresentation of Kempt to Young that the \$3903,09 was *only a "change in account value,"* and then changing the story by admitting Kempt transferred the money to Billie Dunning, the Court found no wrong in this toward Young.

The Court: All right. What I'm suggesting, counsel, is that if – *if the wife withdraws \$3,500 from the account* prior to signing an order transferring the account to him, at request authorizing transfer and (sic) account, then your beef is with the wife.

Mr. Stevenson: Well, your Honor, the decree and whatever followed the decree –

The Court: *Forget the –*

Mr. Stevenson: --as a matter of law transferred it to him.

The Court: No.  
(Emphasis added.)

The Court refused to hold Kempt accountable for the misinformation. CP30, p. 20, l. 15:

Mr. Stevenson: The only trouble I have, your Honor.... is the fiduciary duty of a person who sells stock online? That's what SEI does...

The Court: You know, I don't even want to get into that...

Mr. Stevenson: I am troubled with the brokerage...

The Court: Counsel I have no clue.....

Kempt owed a common law duty to Young to be honest and forthright with respect to what happened to the \$3903.09 which he disbursed to Billie Dunning, despite knowledge of the divorce decree. As a direct and proximate cause of this misrepresentation, Young was forced to bring this lawsuit to recover the money and expend substantial money. Hansen v. Friend, 118 WnApp2d 476, 479, 824 P2d 483 (1992) (whether a Defendant owes a duty of care to a complaining party is a question of law). Forseeability is an issue for the trier of fact. Christen v. Lee, 113 WnApp2d 479, 492, 780 P2d 1307 (1989).

This state has adopted a cause of action and duty owed to third persons for negligent misrepresentation. Restatement (second) of Torts, @552 (1977); Van Dinter v. Orr, 157 WA2d 329 138 P3d 608 (2006) :

Sec.552. Information Negligently Supplied for the Guidance of Others.

(1) One who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions is subject to liability for pecuniary loss caused by them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

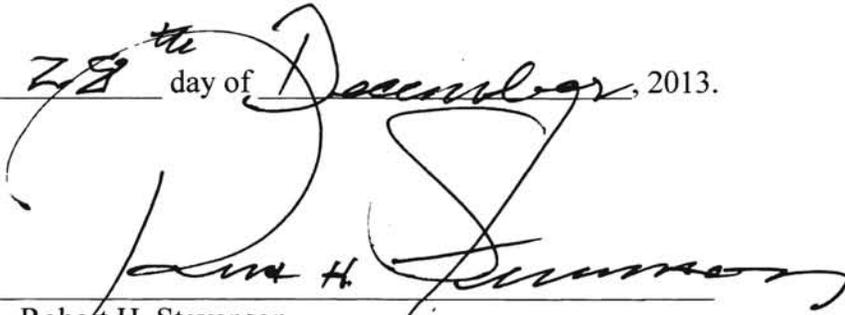
The false information necessitated a lawsuit. Young relied on the false information given to him by Kempt for 17 months before he learned that the information given, that the \$3903.09 was only a "*change in account value*" was actually covering up the disbursement by Kempt to his client Billie Dunning. The trial Court committed reversal by error by ignoring the duty of Kempt. Schaef v. Highfield, 127 WnApp2d 17 (1995); Folsom v. Burger King, 135 WnApp2d 658, 663, 958 P2d 301 (1998). Summary Judgment was inappropriate where material issues of fact call for a trial on the merits

IV. Conclusions

1. The Order granting attorney's fees to Kempt should be vacated, together with Summary Judgment.
2. The dismissal of Young's case for \$3,903.09 against Kempt should be reversed, and judgment entered in favor of Young for \$3,903.09 plus pre-judgment interest.
3. A trial should be ordered on the issue of third party damages incurred by Young in the form of costs and attorneys' fees necessitated by Kempt's false and misleading statements.

Respectfully submitted,

DATED this 28<sup>th</sup> day of December, 2013.

  
Robert H. Stevenson  
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.

12-30-13

