

No. 72238-7-1

FILED  
May 26, 2015  
Court of Appeals  
Division I  
State of Washington

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

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PAULA G. ANDERSON and JOHN DOE ANDERSON, husband and  
wife,

Appellants,

v.

SIMON OROS and VIORICA OROS, husband and wife,

Respondents.

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

The Honorable John Ruhl

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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

Respondents' brief is a morass of confusion and obfuscation. The primary issue before this Court is very simple. Did the Andersons own the claims formerly owned by Anderson Real Estate, a corporation dissolved prior to the institution of this action and prior to any knowledge of any dispute between the parties? If this Court answers that question in the affirmative, then the trial court erred in disallowing the Andersons to submit any evidence of any claims that were originally owned by Anderson Real Estate. Without this evidence, the Andersons could not present a full picture of all of the facts and could not present evidence of the substantial costs incurred by Anderson Real Estate in renovating the property that should have more than offset any claim by Simon Oros.

The answer is also very simple. Of course, the Andersons owned the claim. The Andersons were the sole shareholders of Anderson Real Estate. Anderson Real Estate dissolved in 2009, shortly after the series of transactions with Mr. Oros put it out of business. Upon its dissolution, the assets to the corporation, including any claims and defenses to the Oros' lawsuit, passed to its sole shareholders. The cases cited by Oros are inapposite. Each of the cases cited addresses the survival of affirmative claims against a corporation. Not one of the cases addresses the situation of what happens to the assets of a corporation. Oros would have this court hold that the assets of a corporation reside with the corporation indefinitely and may never be distributed to its shareholders. As further noted below, that result is preposterous.

The initial error of the court in disallowing claims and defenses that originally belonged to Anderson Real Estate cascaded into the remaining errors. The Andersons could not present their side of the case without providing the jury the full story. This court must remand the case back to the trial court to allow the Andersons to fully submit these claims and defenses.

## II. FACTUAL CORRECTIONS

The basic facts of this case are very simple and are set forth in Appellants' initial brief. Oros attempts to confuse the Court with statements made out of context and irrelevant facts. The following is presented to clarify those facts that are relevant to the dispute.

**1. The trial court did not allow the Andersons to present all of their counterclaims, set offs and damages.**

One of the largest elements of the Andersons' counterclaims and damages are the costs that were incurred to refurbish the property. The purchase price of the house was \$340,100. RP 6/10/14 7:21-22. There is no feasible way for the house to be sold in a few months for the amount anticipated by the Property Agreement (approximately \$450,000) unless the house was renovated. Under the Property Agreement, Oros was to be paid from the "proceeds" of the sale. Given this context, the "proceeds" of the sale cannot be determined until one deducts the costs that the parties anticipated spending to renovate. However, based on its ruling on Oros' Motion in Limine excluding all claims that originally belonged to Anderson Real Estate, the Court excluded Exhibit 28, which is an accounting of the costs incurred to

renovate the house. RP 6/11/15 115:14-21. Contrary to Oros' assertion, based on its previous incorrect ruling, the trial court also disallowed a jury instruction that would allow the jury to consider the question of the interpretation of the term "proceeds" in the Property Agreement to take into account the money spent by Anderson Real Estate to renovate the house. RP 6/12/14 105:11-25, 106:1-9.

Although Paula Anderson could testify as to "her" damages, the court limited that testimony to the damages that she personally incurred and for which she was not reimbursed by her company. In fact, counsel for Oros made it quite clear to the jury that Paula Anderson was reimbursed for the costs that she incurred. RP 6/12/15 23:22-25, 24:1-9. The jury was forced to conclude that because Ms. Anderson was reimbursed for her costs, she had no damages.

Of course, the limitation of the evidence severely prejudiced the Andersons. Even if the court only allowed evidence as to the proper amount to deduct from the \$125,692.65, which is the amount the parties received after the underlying loan was paid, to arrive at the "proceeds" of the sale, Oros would have lost his case. One cannot arrive at the "proceeds" of the sale until the following legitimately incurred costs are deducted: 1) the amount to renovate the property (approximately \$75,000); 2) the repayment of a loan on the property (\$8,800); 3) the payment of commission to Anderson Real Estate on the purchase of the property (approximately \$12,000); and 4) the payment of commission to Anderson Real Estate on the sale of the property (approximately \$12,000). After these deductions, the "proceeds" of the sale

are only \$17,892.65. Simon Oros was actually paid \$32,381. Anderson Real Estate only received approximately \$6,600 of the approximately \$24,000 in commissions that it was owed. The reality is that Anderson Real Estate and Paula Anderson absorbed a substantial loss to provide Mr. Oros with more money.

**2. The Andersons did not profit from the sale of the property.**

In his brief, Oros misstates how the money from the sale of the property was distributed. The Andersons provided Oros during discovery with all of the receipts and an accounting of the costs necessary to renovate the property. This accounting was set forth in the excluded Exhibit 28. When Paula Anderson initially looked at this accounting in her deposition, she mistakenly stated that Anderson Real Estate was paid \$18,000 in commissions. She corrected this mistake during her testimony on the stand. RP 6/12/14 39:17 to 41:16. Anderson Real Estate was only paid approximately \$6,000 of the approximately \$24,000 in commissions that it was owed. The testimony at RP 23:17-25 to 24:1-21 shows that the approximately \$19,000 that was paid to Paula Anderson was a reimbursement by Anderson Real Estate for costs that she personally incurred to renovate the property, but these costs were accounted for and substantiated as part of the renovation and were not profit to the Andersons.

**3. Simon Oros took advantage of the Andersons.**

Simon Oros asked Anderson Real Estate to represent him and put a bid on a foreclosure property. He signed an agreement with Anderson Real Estate that once he committed to purchase the property, he could not change his

mind and back out on the purchase. He also knew that to obtain the return on the investment that he expected, the property would require substantial renovation. After committing to the purchase and paying a down payment, he decided he no longer wanted to purchase the property. Paula Anderson, the principal of Anderson Real Estate, in an effort to preserve Oros' down payment and her business, entered into an agreement to purchase the property in her personal capacity. She agreed to pay Oros his down payment from the proceeds of the sale. Anderson Real Estate invested a substantial sum of money to renovate the property. Oros, despite committing to assist with the renovation, did almost nothing. Unfortunately for all concerned, the property did not sell for the price that everyone expected. Oros was actually paid in excess of the "proceeds" of the sale, once the costs to renovate the property and pay the various commissions were taken into account. Anderson Real Estate and Paula Anderson did not, in fact, receive all of the commission to which it was entitled.

Paula Anderson did not hear from Simon Oros for years. He didn't contest the amount he was paid. He didn't contest the amount that Anderson Real Estate put into the property. He didn't ask for additional money. He didn't complain that it wasn't enough. Instead, he waited until 2013 and filed a lawsuit claiming that he should have been paid more money. By that time, Anderson Real Estate had been administratively dissolved for years. What assets remained of the corporation had been distributed both by operation of law and by the only shareholders of the corporation, Paula and Peter Anderson. The administrative dissolution was a matter of public record.

### III. ARGUMENT

#### A. The Trial Court Erred in Excluding Evidence and Testimony Relating to Counter Claims by Anderson Real Estate, Inc.

##### 1. The Assets of Anderson Real Estate, Inc., Including Any Claims Against Oros, Were Distributed to Its Sole Shareholder Paula Anderson By Operation of Law Upon Dissolution.

None of the cases cited by Oros address the question of what happens to the assets of a corporation upon dissolution. The question in Donlin v. Murphy is whether a shareholder in a corporation can maintain a cause of action against an administratively dissolved corporation. *Donlin v. Murphy*, 174 Wn.App. 288, 300 P.3d 424 (2013). The case has no bearing on whether the corporate shareholders own the assets of the corporation after it is dissolved. Likewise, the holding in *Ballard Square Condo Owners Ass'n v. Dynasty Constr.*, 126 Wn.App. 285, 108 P.3d 818 (2005) does not support Oros' position. The Appellate Court in *Ballard Square*, the court held that once a corporation ceases to exist, then claims could no longer be made against the corporation. *Id* at p. 296. In supporting this holding, the Court stated:

"Absent an indication that the Legislature intended to overrule the common law, new legislation will be presumed to be consistent with prior judicial decisions." The legislature's decision not to adopt section 14.07 indicates its intent to retain the common law rule in the context of postdissolution claims. Thus we turn to common law to resolve the issue. And, as we stated above, the common law rule is that claims against corporations terminate upon the corporation's dissolution. The Association disagrees, arguing that the statute continuing a corporation's existence during an indefinite winding up period (RCW 23B.14.050) applies instead of the common law rule because it was also created to supplant the common law rule. But RCW 23B.14.050 continues a corporation's existence indefinitely for the purposes of winding up and does not address claims arising after a corporation has

completed the winding up process. In light of the legislature's refusal to adopt section 14.07, we cannot interpret 23B.14.050 as doing what the legislature refused to do. Nor can we assume that the legislature intended that postdissolution claims survive indefinitely, because the statute does not support the assumption.

*Ballard Sq. Condo. v. Dynasty Constr.*, 126 Wn. App. 285, 295-296, 108 P.3d 818, 823-824 (2005)

The holding in *Ballard Square* regarding the ability to sue corporations was subsequently overruled by statute. *Chadwick Farms Owner Ass'n v. HHC, LLC* 139 Wn. App. 300, 308, 160 P.3d 1061 (2007). However, the reasoning with respect to statutory interpretation stands. The changes to the Washington Business Corporations Act did not alter the holding in *Zimmerman*, that “[t]he corporate assets and liabilities pass to the beneficial owners of the corporation, *i.e.*, the shareholders, subject to the claims of corporate creditors.” *Zimmerman v. Kyte*, 53 Wn. App. 11, 18, 765 P.2d 905, 909 (1988)

Further, none of the cases cited by Oros addresses what happens to the assets of the corporation when the affairs of the company are concluded. Fortunately, the current statute does address this situation. Regardless of how the dissolution came about, once the business is concluded, the assets of the corporation are distributed to its shareholders. RCW 23B.14.050.

As noted in Appellants' initial brief, the revisions to the business corporation statute did not change the holding in *Ban-Mac, Inc. v. King County*:

As stated in 19 C.J.S. *Corporations* § 1730, p. 1489 (1940), "In the absence of statute, the legal title to property belonging to the corporation passes by operation of law to the stockholders, who are the beneficial owners through the corporation, and who take as tenants in common . . . ."

*Ban-Mac, Inc. v. King County*, 69 Wn.2d 49, 50, 416 P.2d 694, 695 (1966) .

## **2. The Assets of Anderson Real Estate, Inc., Transferred to Paula Anderson By Distribution.**

Oros does not address at all the Andersons' statement with respect to the effect of the distribution of the corporate assets as noted in the alternate ruling, the Court in *Zimmerman v. Kyte*. For ease of reference, the citation is repeated below.

A corporation may "distribute" assets to a shareholder at any time, so long as creditors of the corporation are not prejudiced thereby. RCW 23A.08.420. The distribution need not be authorized by the corporation's board of directors when the corporation's shareholders unanimously consent. *Glover v. Rochester-German Ins. Co.*, 11 Wash. 143, 39 P. 380 (1895). No particular words are required for a valid and binding assignment entitling the assignee to sue in the assignee's own name. Rather, any language showing an intent in the owner to transfer and invest the cause in the assignee is sufficient. *Amende v. Morton*, 40 Wn.2d 104, 106, 241 P.2d 445 (1952).

Finally, the assignment need not be in writing, at least not in this case. RCW 4.08.080 permits an assignee of a chose in action "by assignment in writing" to sue on the cause in the assignee's own name. This statute is in derogation of the common law rule *against* assignment of a chose, and should ordinarily be strictly construed. However, an oral assignment satisfies the statute when the assignor takes the witness stand and testifies that the assignment occurred. *Ingle v. Ingle*, 183 Wash. 234, 237-38, 48 P.2d 576 (1935). Since *Zimmerman* and *Bloom*, Plaza's sole shareholders and managing officers, both averred that Plaza transferred its tort claim to the

Zimmermans, albeit under a mistaken notion of corporate dissolution, the oral assignment satisfies RCW 4.08.080.

*Zimmerman v. Kyte*, 53 Wn. App. 11, 17-18, 765 P.2d 905, 908-909 (1988)

### **3. Oros Cannot Argue Prejudice With Respect to the Anderson Real Estate Corporate Status.**

The dissolution of Anderson Real Estate is a matter of public record. Oros seems to be claiming that is suffered some sort of prejudice because the Andersons did not add Anderson Real Estate as a party; however, a party cannot claim prejudice when the public record provides constructive notice of the true facts. *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 56, 80, 277 P.3d 18, 32 (2012). Oros had knowledge of the costs asserted by Anderson Real Estate as a counterclaim. Oros lost his Motion in Limine in which he sought to exclude evidence of damages that were not fully disclosed in discovery Superior Court Civil Rule 15(b) RP 51:14-25; 52:1-3. Oros cannot now complain that he was surprised that Anderson Real Estate was a dissolved corporation and that revelation somehow prejudiced his ability to pursue his case.

### **B. The Trial Court Erred In Not Allowing the Jury to Consider the Andersons' Damages As A Setoff to Plaintiffs' Claims.**

The trial court's error in not allowing the Andersons to present evidence of a set off to Oros' claims stems both from the exclusion of the costs incurred to renovate the property as well as the dismissal of the claim with respect to the oral agreement by Oros to assist in the renovation. When the Andersons were precluded from submitting evidence regarding the costs to

renovate the property, the Andersons were also precluded from providing evidence with respect to the meaning of the term “proceeds” of the sale. Under the Property Agreement, repayment to Oros was limited to the “proceeds” of the sale. Given that renovation of the property was necessary in order to achieve the price the parties anticipated, the Andersons reasonably interpreted the “proceeds” to take into account the costs to renovate the property as well as the fees, commissions and other costs that were incurred as part of the transaction. As noted above, the trial court improperly excluded all of these damages.

The trial court also improperly dismissed the Andersons’ claim against Oros based on his oral agreement to assist with the renovation of the property. As noted in Appellants’ initial brief, on this issue, the trial court was just flat out incorrect. The oral agreement by Oros arose out of the same transaction as the Property Agreement. Oros cannot lie in wait until the statute of limitations for the claim against him has run and then not allow the Andersons to, at the very least, assert the breach of that agreement as a set off for the affirmative claims. “Statutes of limitations never run against defenses arising out of the transactions sued upon.” *Allis-Chalmers Corp. v. N. Bonneville*, 113 Wn.2d 108, 112, 775 P.2d 953, 955 (1989); *Seattle First Nat’l Bank, N.A. v. Siebol*, 64 Wn. App. 401, 407, 824 P.2d 1252, 1255 (1992)

**C. The Trial Court Erred in Granting Oros’ Motion for an Award of Pre-Judgment Interest.**

First, if the Andersons are successful in overturning the underlying ruling, then the award of interest should also be overturned. However, beyond

that obvious result, the trial court's ruling allowing pre-judgment interest should be overturned on the basis that it is manifestly unfair. Oros complains in his brief that he lost the "use of the money"; however, Oros did nothing – not one thing – to assert his claim during the four years between the alleged breach and the lawsuit. He didn't complain to Paula Anderson. He didn't write a letter. He didn't assert any claim at all. Paula Anderson had no idea whatsoever that Oros intended to make a claim for the remainder of the money. Oros should not be allowed to do absolutely nothing to assert his claim for four years and then reap a profit of 150% of his alleged loss, particularly when 1) the contract that was allegedly breached did not provide for any interest and 2) this outrageous interest rate is better than any investment Oros could have made during one of the most significant recessions in history. In addition to the arguments made in Appellants' previous brief, the Court's ruling in this situation is arbitrary and capricious and should be overturned.

The trial court granted Oros' motion for pre-judgment interest in the amount of \$27,006.43, an amount that represents fifty three percent (53%) of the principal. RCW 4.56.110(1) limits the amount of interest that a court may award in an action on a breach of contract to the following:

(1) Judgments founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in the contracts: PROVIDED, That said interest rate is set forth in the judgment.

RCW 4.56.110().

The Property Agreement clearly states “[n]o interest shall accrue on the unpaid balance” of Oros’ down payment. The trial court cannot award interest in excess of that which is set forth in the contract and erred in awarding any interest at all.

**D. The Trial Court Erred in Awarding Excessive Attorneys’ Fees to Oros.**

If the Andersons are successful in their appeal, the award of attorneys’ fees should also be overturned. However, contrary to Oros’ assertion, there is no evidence that the trial court reviewed the record at all with respect to the attorneys’ fees award. The court made no adjustment for the fact that the attorneys’ fees far exceeds what is reasonable for the amount of the claim. As noted in Appellants’ initial brief, when combined with the pre-judgment interest, it is greater than the principal judgment. Essentially, plaintiff recovered every penny of attorneys’ fees allegedly incurred for this claim, even though of the plaintiffs’ nine motions in limine, five were denied and two were withdrawn. Plaintiff should not be allowed to recover attorneys’ fees for unsuccessful motions.

The trial court’s discretion is limited by reasonableness. *Wilkinson v. Smith*, 31 Wn.App. 1, 14, 639 P.2d 768 (1982). *Singleton v. Frost*, 108 Wash. 2d 723, 731-32, 742 P.2d 1224, 1228-29 (1987) (\$40,000 in fees for \$25,000 in controversy is excessive.)

The amount of the attorneys’ fees requested in this case far outweighs what is reasonable given the amount in controversy and the number of

unsuccessful motions. This Court should remand the case to the trial court to reduce the amount of attorneys' fees awarded to a reasonable amount.

**E. Request for Attorneys' Fees On Appeal.**

If the Andersons are successful in overturning the trial court's decision, the Andersons should be awarded their attorneys' fees on the appeal pursuant to RAP 18.1. As noted by Oros, the Property Agreement awards attorneys' fees to the prevailing party.

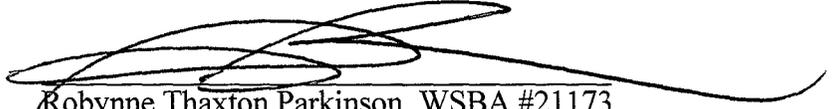
**IV. CONCLUSION**

The trial court materially prejudiced the Andersons by disallowing them to submit evidence and testimony regarding the claims and defenses that were previously held by Anderson Real Estate. By operation of law, the Andersons were the sole owners of those claims and defenses, and the trial court should have allowed the evidence. The court furthered its error by dismissing the Andersons ability to introduce evidence to provide context and meaning to the term "proceeds" as set forth in the Property Agreement and dismissing the affirmative claim against Simon Oros for failing to assist with the renovation of the property. Then the court put the nail in the fairness coffin by 1) allowing Oros to lay in wait for four years, utterly silent as to his dispute with Paula Anderson, and then reap a substantial windfall by allowing the award of interest and 2) awarding full attorneys' fees to Oros, even on those claims and arguments that failed. To correct these manifest errors, this court must remand the case back to the trial court.

Dated this 26<sup>th</sup> day of May 2015

Respectfully submitted,

THAXTON PARKINSON PLLC

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

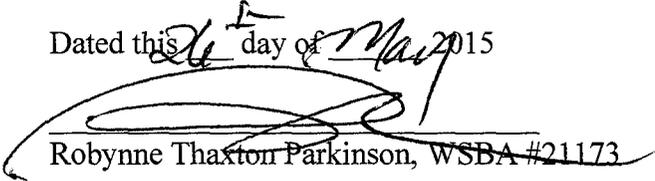
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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Appellants' Reply Brief to be served on the following named person on the date indicated below via email and by mailing a true copy thereof, contained in a sealed envelope, addressed to said person at the address indicated below:

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Dated this 26<sup>th</sup> day of May 2015

  
Robynne Thaxton Parkinson, WSBA #21173