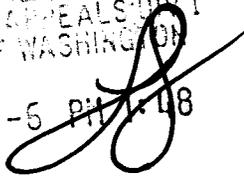


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No. 74636-7-I

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

**KIMBERLY A. HANSEN as her separate estate,
formerly known as KIMBERLY ROZGAY, Appellant**

v.

MARK A. ROZGAY, individually and in his capacity as Personal Representative Estate of BARBARA ROZGAY, Trustee of the CORDES TRUST, ROZGAY FAMILY INVESTMENTS, LLC, a Washington Limited Liability Company and the marital community of MARK ROZGAY AND BABBI ROZGAY, husband and wife, Respondents.

BRIEF OF APPELLANT

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Introduction to Reply

Rozgay moved for summary judgment pursuant to CR 56 on the basis that there are no genuine issues whether (1) his sister Hansen has standing, whether (2) non-testamentary, transactional documents were knowingly and meaningfully executed and not obtained by undue influence and whether (3) Hansen's challenges to conveyances not related to a will nor funded by a will should be, for all purposes, treated as a "will contest."

Rozgay avoids addressing Hansen's substantial evidence and hopes this Court will interpret these three items while ignoring all other law and facts: that (1) an email written by Hansen after Barbara's death defeats Hansen's standing, that (2) a declaration by Dr. Williams establishes transactional capacity, defeats all testimony to the contrary, and negates inferences of Rozgay's undue influence, and that (3) the law applicable to Barbara's Last Will and Testament is binding on deeds, gifts, a sale agreements, a security filing, and six assignments of LLC membership interest.

Rozgay relies on Hansen's angry email as proof Hansen was estranged from the family and it was natural for Hansen to be disinherited. In order to make that argument succeed, Rozgay must explain why Hansen

was included in the December 24, 2010, drafts. Attorney Ostrem's testimony depicts Barbara and Clarence struggling to decide about Hansen; to make a decision they never chose to make until they were pressed to decide. Rozgay thought Hansen should be excluded "because noone (sic) had heard from her" (CP 751). However, it was not that clear to Barbara and Clarence; they were undecided (CP 772-4). Between December 24 and 27 Attorney Ostrem sent emails to and received answers from Rozgay; thereafter Hansen was excluded from two non-testamentary trusts.

When Hansen learned she was excluded from the non-testamentary Rozgay Family Living Trust, Hansen tried to find out what happened. She wrote the December 11, 2001, email to Rozgay expressing her confusion and outrage:

There can be no explanation as to "Barb's reasoning" as to why she cut Lisa and I out of her will other than pure hatred. I shudder to think of you (Mark Rozgay) having anything to do with it. (Parenthetical added.) (CP 120).

Hansen expected to be included; otherwise, there would be no reason for her to state, "[t]here can be no explanation as to 'Barb's reasoning.'" It would have been easy for Rozgay to reply, "Come on Kim, you know they hated you." But that is NOT how Rozgay replied. Instead

he confirmed Hansen's suspicion. Rozgay's reply was Hansen's first clue of Rozgay's involvement. Rozgay's December 23, 2011, email stated:

... I am offended that you would even question my integrity and honesty regarding the will, their estate and who they included or excluded. The only part I took in their estate planning was getting a reference for an attorney from David Hay at Evergreen Capital ...Doc and Barb's accountant advised them to update their will since it was dated sometime in the 1980's. I was present at the meeting. **At the end of the meeting the attorney (Kanoa Ostrem) asked if they wanted to add any beneficiaries or subtract any beneficiaries. Barbara asked me and I told her it was none of my business what they did with their estate.**

Concerning the Hood Canal house, I told Barb and Doc that they had a lot of deferred maintenance or the house would crumble. I gave them a list of items including, new roof, new gutters, new windows, new doors, remodel bathrooms, remodel kitchen, replace carpets, replace window coverings, paint the exterior, etc. They asked if I would pay for it and I replied it was not my house. They asked if I wanted the house to stay in the family and I of course said yes. They said that if I wanted to pay for everything they would give it to me since they could no longer go there. **I told them that they needed to at least include Michael since noone (sic) had heard from you in quite a while.** (Emphasis added) (CP 751)

Rozgay's reply shows that Barbara looked to Rozgay for advice.

Rozgay told Barbara and Clarence that the Hood Canal house would crumble. Rozgay's email confesses he led Barbara and Clarence to include Michael Blain-Rozgay but to exclude Hansen. Rozgay's statements cannot be reconciled. At the end of the first paragraph, he claims it is none

of his business. At the end of the second paragraph, Rozgay made it his business to get the Hood Canal house for himself and Michael and to exclude Hansen.

Rozgay conveniently omits that the act that isolated Hansen from her family was concealment of the death of Uncle Matt's, with whom Hansen enjoyed a treasured relationship. Michael, in his email to Hansen of December 20, 2011, conceded concealment of Uncle Matt's death. In that email, Michael confessed:

What I did hear from the last three years (or since Uncle Matt's memorial) was Barbara asking me if I'd heard from you. Every phone call she would ask what it was she did to make you stay away. I would say it wasn't her. You were angry with me and Mark for not telling you about Uncle Matt. (Emphasis added) (CP 573).

After showcasing Hansen's email to challenge Hansen's standing, Rozgay next relies on a declaration from Dr. Williams. At best, it addresses only their ability to make "informed consent" -- presumably to medical treatment -- and a conjecture that they possessed testamentary capacity.

By contrast, the 24/7 caregivers saw Clarence every day throughout 2010 in a normal environment; an environment where Clarence mowed the street, flushed Depends, and could not be trusted to walk around the block. The caregivers testified Barbara could not

understand how to pay a bill without coaching, and could not recall a repetitiously practiced exercise routine. Rozgay relies on Dr. Williams but virtually ignores the testimony of the caregivers. Likewise, Rozgay does not address the testimony of accountant McAuliffe that Clarence would sit in the corner and talk to himself (CP 675-7). Rozgay fails to explain why Michael Blaine-Rozgay informed the Memory Loss Care Unit of Overlake Terrace that both Barbara and Doc suffered dementia (CP 432-3) sufficient to justify the cost of extra security and restraint provided by a memory loss care unit.

Rozgay mistakenly relies on the fact that Barbara executed a will. Rozgay argues every document signed on the same date as a will should be treated as a will. This argument ignores the difference between testamentary, non-testamentary, transactional and donative documents. Rozgay's argument mis-assigns the burden of proof between the proponent or challenger of the documents as well as the applicable evidentiary presumptions.

1. HANSEN HAS STANDING. HANSEN'S STANDING IS UNAFFECTED BY HER DECEMBER 11, 2011, EMAIL.

Rozgay acknowledges Hansen's reliance on RCW 74.34 (Response Brief at 37). Rozgay argues only that "*Plaintiff Lacks*

Standing to Remove Mark Rozgay as Attorney-in-Fact for Clarence Rozgay” RCW 11.94.090(1)(f). (Response, 36-40.)

Without addressing standing under RCW 74.34, Rozgay circles back to Hansen’s December 11, 2011, email, written after Barbara’s death and before Hansen received Rozgay’s eye-opening reply of December 23, 2011. Hansen filed suit on December 22, 2014 (CP 45). This is important because Rozgay argues standing is determined at the date of filing.

Response Brief, at 39 states:

One either meets the statutory criteria **at the time the suit is filed or not**. The United States Supreme Court discussed the concept of standing as being linked to the state of matters at the time of filing in *Grupo Dataflux v. Atlas Glob. Grp., L.P.*; “it has long been case that the jurisdiction of the court depends on the **state of things at the time the action brought**. This time-of-filing rule is hornbook law (quite literally) taught to first-year law students in any basic course on federal civil procedure.”

Grupo dealt with standing based on diversity. The Court held that changing a party’s citizenship after filing cannot retroactively cure a lack of subject matter jurisdiction at the time the action was filed.

Rozgay argues: Hansen distanced herself from the family. According to Rozgay, Hansen’s remoteness caused her to lose standing. Rozgay points to Hansen’s emotional email of **December 11, 2011**, as proof Hansen is not a genuinely interested party and that Hansen lacks standing.. However, Rozgay wrote his eye-opening reply on **December**

23, 2011. After Hansen's received Rozgay's self-incriminating email, Hansen demanded an Inventory. Rozgay admits the Inventory of Barbara's estate was provided **March 18, 2014** (CP 146). Hansen's Complaint alleges that "On **April 29, 2014**, Plaintiff Hansen first received Trustee's Reports from Defendant Rozgay for the activity of Cordes Trust for the years 2005, through 2013" (CP 24). Rozgay admits providing Cordes Trust Reports **April 29, 2014** (CP 149). Hansen alleged that Rozgay sold Cordes Trust real estate on **July 16, 2012** (CP 25). Rozgay admits this is true (CP 149). Hansen alleges she did not receive the Settlement Statement for the 2012 sale until **April 29, 2014** (CP 24). Rozgay does not deny this. (CP 149)

Rozgay's Response at 39 states: "Ms. Hansen was required to make a showing that she was an interested person **at the time of filing.** The record contains no such showing." Rozgay wants to ignore Rozgay's reply and the intervening disclosures that culminated in Hansen's decision to file this action on December 22, 2014. As the daughter of Clarence and Barbara, Hansen always had standing to seek protection of her parents and/or their estates. Hansen always had standing to bring her own claim for damages, as distinguished from a TEDRA Petition. RCW 74.34. An old email, written years before this action was filed, is not determinative of Hansen's standing.

2. HANSEN’S CHALLENGE TO TRANSACTIONS, NON-TESTAMENTARY CONVEYANCES AND GIFTS IS NOT A WILL CONTEST.

Hansen’s lawsuit is not a will contest. Hansen’s Opening Brief cites RCW 11.02.091¹ defining testamentary documents. Rozgay’s Response ignores RCW 11.02.091. Rozgay also ignores *In Re VerBeeks Estate*² distinguishing testamentary from non-testamentary documents.

In the first 22 pages of the Response, Rozgay calls Hansen’s lawsuit a will contest 23 times.³ Rozgay admits a matter may be treated as a will contest IF it requires determination of “issues affecting the validity of the will.”⁴ If a matter does not require determination of an “issue, affecting the validity of a will,” then it is not a will contest.⁵ Hansen’s complaint does not challenge the validity any will (CP 1-40).

Rozgay relies on two cases for his claim that the Court can characterize any lawsuit as a will contest regardless of whether it involves the validity of a will.

Rozgay relies on *Estate of Palmer*.⁶ In *Palmer*, the plaintiff took no action to contest the will within the four month period. Later plaintiff sued to challenge the designation of beneficiaries named in a testamentary

¹ Opening Brief, 17, 36.

² 2 Wn. App. 144, 467 P. 2d 178 (1979) Opening Brief at 17-19.

³ Response Brief at 7, 8, 12-18, 20 and 22.

⁴ *Cassell v. Portelance*, 172 Wn. App. 156, 162, 294 P. 3d 1, 3 (2012).

⁵ Respondents’ Brief, 13.

⁶ 146 Wn. App. 132, 137-138, 189 P. 3d 230 (2008); see Respondents’ Brief at 14.

trust. The trust was funded by the will. Because the trust was funded by the will, a challenge to the validity of the testamentary trust required adjudicating issues as to the validity of the will. In *Palmer*, the Court observed that the trust was a recipient of property sourced by the will, for the beneficiaries named in the trust. Before the decedent's death, the testamentary trust existed only on paper and was not funded until the testator died, the will was admitted to probate and the distribution was approved.

Hansen's Complaint does not challenge Barbara's will. Barbara's will left an investment account and residual personal property to her spouse, if he survived her, and then to sons Mark Rozgay and Michael Rozgay. However, significant assets were not part of the probate estate. The Medina house was conveyed by deed (not testamentary devise) to the Rozgay Family Trust. The deed immediately and irrevocably divested Clarence and Barbara of their interest in the Medina home. The Rozgay Family Trust was not created by any will. It was not funded by any will.

Applying the holding of *VerBeek*, the conveyance by deed that funded the Rozgay Family Trust was not testamentary. The Court in *Palmer* considered a challenge to the testamentary trust to be a will contest because the trust was funded by the will and the beneficiaries of the

testamentary trust were involved in creating the will. *Palmer* is inapplicable.

The other case upon which Rozgay relies is *Cassell v. Portelance*⁷ where Dr. Portelance intervened because Cassell's personal representative sued the physician for a wrongful death. Dr. Portelance reasoned that removing the personal representative would result in the dismissal of the case against him. Ordinarily, seeking removal of the personal representative for misconduct is unrelated to determining the validity of the will. However, Dr. Portelance presented evidence that Cassell was comatose at the time the will was purportedly signed and neither of the attesting witnesses saw Cassell sign the will. The Court saw through the subterfuge and concluded that removing the personal representative depended on the validity of the will. On that basis, the Court characterized Dr. Portelance's lawsuit as a "will contest."

Hansen is not challenging Barbara's will. Hansen is challenging *inter vivos* transfers. Without reference to any will, Barbara's separate property Hood Canal house was converted to community property. Barbara conveyed the Hood Canal house to Rozgay Family Investments, LLC by deed. Clarence and Barbara were momentarily members of the LLC, but then they made an *inter vivos* assignment of their Membership to

⁷ Discussed at length in Respondents' Brief at 13-15.

Rozgay as Trustee of the Rozgay Irrevocable Trust. The rest of Clarence and Barbara's Membership Units were sold under contract to Rozgay as Trustee. Similarly, the Medina house was conveyed to the Rozgay Family Trust by deed. These *inter vivos* conveyances were immediate, irrevocable and unrelated to any will.

Rozgay's reliance on *Palmer* is misplaced because it is a challenge to a trust funded by a will, hence a will contest. Likewise, *Cassell* involved a subterfuge to invalidate the will upon the hope that a wrongful death action would be dismissed. Neither *Palmer* nor *Cassell* are even close the facts in Hansen.⁸

3. HANSEN'S CLAIM FOR ROZGAY'S DIVERSION OF CORDES TRUST FUNDS IS NOT A WILL CONTEST.

The Cordes Trust was created without reference to any will. The Cordes Trust was established by Barbara's parents to provide for Barbara with any remaining Cordes Trust assets to be distributed to Hansen, Rozgay, and the other two children. Rozgay obtained control over the Cordes Trust by his appointment as Trustee in 2004. Rozgay made

⁸ At the time Hansen's action was commenced, Clarence resided in The Memory Loss Care Unit of Overlake Terrace. During the pendency of this litigation, Clarence died. His Will has been filed; however, probate has not been opened. Clarence's Will has not been admitted to probate. No Personal Representative has yet been appointed. Accordingly, Hansen's lawsuit could not have challenged the Will of Clarence Rozgay because he was still alive until a date significantly after this appeal was filed.

distributions to Barbara. Every distribution made to Barbara reduced the amount available for distribution to the Remainder Beneficiaries.

During discovery, Hansen learned Rozgay diverted money from the Cordes Trust to pay Hood Canal house expenses after Barbara had been divested of her interest in that house and after Clarence and Barbara had gifted the Hood Canal house (via Rozgay Family Investments, LLC) to Rozgay as Trustee of Rozgay Irrevocable Trust. Neither Clarence nor Barbara were beneficiaries of the Rozgay Irrevocable Trust.

Hansen alleged Rozgay diverted Cordes Trust funds to pay Hood Canal house expenses which could have been distributed to the remainder beneficiaries. Rozgay does not deny using Cordes Trust money to pay Hood Canal house expenses after Barbara and Clarence divested all their interest in the Hood Canal house. Rozgay attempted to explain away this diversion by offering inadmissible testimony that Barbara gifted money from the Cordes Trust to Rozgay to pay Hood Canal house expenses after Barbara's interest had been extinguished. Rozgay claims Barbara told him to use the money for this purpose and on that basis, Barbara gifted the money to Rozgay.

Hansen's Opening Brief (46-48) shows Rozgay's testimony about his conversations with Barbara (since deceased) is inadmissible. RCW 5.60.030. Rozgay's management of Cordes Trust is unrelated to the

validity of any will and is unrelated to Rozgay's performance as Personal Representative of Barbara's estate Claims of asset mismanagement are unrelated to the validity of any will and Rozgay did not meet his burden as moving party; e.g. demonstrate absence of issues concerning the gift.

4. BY MISCHARACTERIZING THE ACTION AS A "WILL CONTEST," ROZGAY'S BURDEN OF PROOF WAS IMPROPERLY ASSIGNED TO HANSEN

Rozgay's Response at 27 addresses the burden of proof as follows:

Ms. Hansen bears the burden of proof. She must demonstrate incapacity by clear, cogent and convincing evidence in order to overcome the presumption of capacity afforded to testators. Ms. Hansen fails to overcome the presumption of capacity and **thus respondents bear no burden to make a positive showing of Clarence and Barbara's capacity.** (Emphasis added.)

The burden of proof is tied to the nature of the bequest, transaction or conveyance being challenged. *White v. White*, 33 Wn. App. 364, 655 P. 2d 1173 (1982) shows Rozgay, as moving party, had the burden of showing there are no genuine issues of material fact.

In *White*, Daisy White appealed a decree quieting title to the family home in favor of her son, Leo White. Leo "was considered to be the trusted family figurehead, loved and depended upon by his mother. In July 1971, Daisy signed a quit claim deed conveying the family home to Leo, reserving to herself a life estate therein." *White*, 33 Wn. App. at 364. On that same day, Daisy signed a Bill of Sale conveying the family business

to Leo. In 1976, Daisy hired a lawyer to change her will so “that her home could be shared by all her children.” *Id. at 366*. Daisy claims she was unaware of deed. She sued to cancel the deed, alleging the transfer of title was the result of Leo’s undue influence. Daisy “argues it must have been one of many documents Leo presented for her signature while she was seated at her sewing machine.” *Id. at 366*. Like Rozgay, Leo claims the transaction was discussed and that title was transferred to him in an effort to minimize federal and state taxes upon his mother’s death. “He claims the gift was made freely, voluntarily and with full understanding with the assistance of counsel.” *Id. at 366*. The Trial Court found: “Daisy failed to carry her burden of proof that Leo White exerted undue influence over her.” *Id. At 367*.

Because the Trial Court improperly imposed the burden of proof on Daisy, the decree quieting title was reversed and remanded for trial.

Addressing allocation of the burden of proof, *White* observed:

Washington has steadfastly adhered to the rule, first enunciated 60 years ago, that where the donee occupied a fiduciary relationship to the donor at the time the gift was made, the donee bears the burden to prove lack of undue influence. *Meyer v. Champion*, 120 Wash. 457, 207 P. 670 (1922). That rule was last reiterated in this jurisdiction in *McCutcheon v. Brownfield*, 2 Wn. App. 348, 467 P.2d 868 (1970) review denied, 78 Wn.2d 993 (1970). See 38 Am.Jur.2d Gifts § 106 (1968), where the rule is stated: In such a situation **the donee must show by explicit and convincing evidence that the donor intended to make a**

present gift and unmistakably intended to relinquish permanently the ownership of the subject of the gift. (Emphasis added.)

It is uncontested Rozgay enjoyed his parents' absolute and complete trust. He managed the Cordes Trust for many years. Rozgay testified that Barbara and Clarence trusted him "completely" (CP 583) Barbara literally looked to Rozgay for guidance when Attorney Ostrem ask whether she wanted to add or delete beneficiaries. (CP 751) Clarence and Barbara accepted upon Rozgay's representation that the Hood Canal house would "crumble" because there was much deferred maintenance. (CP 751). Rozgay's representation that the Hood Canal house would crumble was blindly accepted because it was at a time when neither Barbara nor Clarence could visit the Hood Canal house to test the veracity of the representation. (CP 751) That Rozgay held a confidential relationship of trust is an undisputed fact, and that fact controls assignment of the burden of the burden of proof.

On appeal, Leo (like Rozgay) argued that the party challenging the *inter vivos* deed had the burden of proof. *White* summarily rejected that argument at 369-70 as follows:

As support for his argument, i.e., that this same rule applies to inter vivos transactions, Leo cites a federal court decision applying Washington law, *Hilton v. Mumaw*, 522 F.2d 588, 599 n. 10 (9th Cir.1975). In *Hilton*, the court was asked to determine the question of alleged undue influence

in the execution of a contract for the sale of corporate stock. **The court failed to distinguish the *McCutcheon* rule (involving an inter vivos gift) from the *Reilly* rule (involving a will contest).** The court, in expressing a burden of proof rule applicable to a challenge to the validity of the execution of an express sales contract, stated that the *McCutcheon* rule, i.e., imposing the burden to prove the absence of undue influence upon the finding of a fiduciary relationship alone, was mere dicta and, in any event, was modified by the later decision of *In re Estate of Reilly*, supra.

While we do not question the federal court's application of the proper rule of law to the facts before it, we cannot accept that court's interpretation of Washington law applicable to an inter vivos gift. **The rule in *Reilly* is limited to will contests.** (Emphasis added)

White is important because it demonstrates the danger of misapplying the burden of proof in a will contest to a general civil action challenging non-testamentary *inter vivos* transfers. The burden is on Rozgay to show the absence of all genuine issues. The reason for this allocation of proof when the donee of an *inter vivos* transfer distinction is explained in *White* at 370-71:

The rationale for distinguishing a challenge to a **gift during one's lifetime** from a challenge to a **disposition upon one's death** has been enunciated in this jurisdiction. By making a gift during a person's lifetime, he (she) strips himself of that which he can still enjoy and of which he may have need during his life; while by his will he disposes of that which can be of no further use to him. As he is, under ordinary conditions, so much the less likely to do the first than the second, courts subject to gifts to the sharper scrutiny.

In conclusion, we hold that in alleged inter vivos gift transactions, upon a sufficient showing that the donor has reposed such trust and confidence in the donee as to create a fiduciary relationship, a **presumption arises which thrusts upon the donee the burden of persuasion to establish the absence of undue influence**. Accord, *Luse v. Grenko*, 251 Iowa 211, 100 N.W. 2d 170; *Schlichting v. Schlichting*, 15 Wis. 2d 147, 112 N.W. 2d 149 (1961) See generally 3 W. Bowe & D. Parker, Page on Wills § 29.84 (1961). (Emphasis added.)

Rozgay must show not only the absence of issues of material fact, he also must demonstrate the absence of undue influence before Hansen had any burden to demonstrate the existence of issues for trial.

5. DR. WILLIAMS' DECLARATION FAILS TO PROVE CAPACITY AND IS CHALLENGED BY SUBSTANTIAL TESTIMONY THAT IS NOT ANSWERED BY EITHER DR. WILLIAMS OR ROZGAY.

Rozgay contends that the declaration of Dr. Williams satisfies Rozgay's burden. Rozgay asserts Dr. Williams eliminates every issue as to capacity. Rozgay treats this testimony as an invincible rebuttal to the testimony of multiple witnesses regarding Clarence and Barbara's capacity even though Dr. Williams' testimony is based on recollection and a limited record review. (Hansen's Opening Brief, 19-21.) By contrast, testimony by professional caregivers who, unlike Dr. Williams, actually lived with Clarence and Barbara 24/7 provide eye-witness accounts impossible to reconcile with Dr. Williams' testimony. (Hansen's Opening Brief, 26-34.) Hansen's detailed evidence refutes the generic conclusions

of Dr. Williams. Yet, Rozgay argues that “the opinion of an attending physician” cannot be overcome by the testimony of professional caregivers (Response 24-25. Rozgay argues at Response 27:

Even if the court is to assume *ad arguendo* the Respondents make a showing of Clarence and Barbara’s capacity, Dr. Williams’ testimony clearly demonstrates that Clarence and Barbara had the requisite capacity to execute their estate planning documents.

Even without according Dr. Williams’ testimony with the special consideration it must be given, it alone is clearly sufficient to establish capacity. (Emphasis added.) (Response Brief at 27)

Rozgay assumes Williams’ medical license trumps all other witnesses regardless of their experience or opportunity to observe. Legal authority to the contrary is presented at Hansen’s Opening Brief 24. Additionally, Hansen substantially countered Dr. Williams by reference to medical records from Williams’ files that do not support the conclusions stated in Williams’ declaration. (See Hansen, 25-26.) As Rozgay’s summary judgment motion admits, *supra*, Hansen is entitled to all reasonable inferences from the evidence.

Weatherbee v. Gustafson, 64 Wn. App. 128, 822 P. 2d 1257 (1992), the exploding pillow case, demonstrates the non-moving party’s entitlement to all reasonable inferences. Wanda Weatherbee lit a votive candle and put it on her headboard before she and her companion retired

for the night. Apparently, Wanda shifted in bed causing the pillow to contact the candle flame. The smoke alarm failed. Wanda's companion awoke to the smell of smoke and saw Wanda's pillow was aflame. When he grabbed it, the pillow exploded and molten pillow stuffing burned Wanda. Wanda sued contractor Gustafson and smoke alarm manufacturer Pittway. Gustafson and Pittway moved for summary judgment arguing that a defective smoke alarm did not proximately cause Wanda's injuries. The Court granted summary judgment dismissing Gustafson and Pittway upon finding that Wanda presented no evidence connecting the defective smoke alarm to her injuries. The Court of Appeals reversed.

A motion for summary judgment should be granted if there is no genuine issue of material fact or if **reasonable minds could reach only one conclusion on that issue based upon the evidence construed in the light most favorable to the non-moving party.** *Sea-Pac Co. v. United Food and Comm'l Workers Local Union 44*, 103 Wn.2d 800, 802, 699 P.2d 217 (1985) (Emphasis added).

The burden is on the non-moving party to make out a prima facie case concerning an essential element of the claim if the moving party first shows that there is an absence of evidence to support the non-moving party's case. *Young*, supra; see also *Hash v. Children's Orthopedic Hosp.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988).

After summarizing the standard, *Weatherbee* instructs:

[T]o successfully move for summary judgment a party must demonstrate a lack of evidence or a material fact which cannot be rebutted. *Young*, 112 Wn.2d at 225, 770 P.2d 182. The evidence and all reasonable

inferences therefrom must still be examined in the light most favorable to the non-moving party to determine if there are genuine issues of material fact for trial. *Young*, 112 Wn.2d at 226, 770 P.2d 182.

Gustafson and Pittway argued Wanda failed to prove a smoke detector is more sensitive than a person. The Court noted Wanda's sleeping companion awoke to the smell of smoke and grabbed the flaming pillow. The Court found it reasonable to infer: If there was enough smoke to awake the sleeping companion, the smoke detector should have sounded the alarm. The Court went on to observe at 133 that:

[T]he claims of the moving parties did not eliminate competent evidence in the record from which a finder of fact could draw reasonable inferences in support of the essential elements of appellant's claim. Therefore, the burden of proof in the present case did not shift to the appellant, and summary judgment in favor of respondent was incorrect....

Respondents make a sweeping conclusion that there was a lack of evidence showing prima facie proximate cause, by merely claiming that there was no evidence establishing that the smoke alarm would have gone off had it been working or that Mr. Chase would have acted any differently in throwing the pillow had the alarm gone off. We disagree.

The respondents claim that the smoke alarm would not have gone off before the pillow exploded because Ms. Weatherbee testified that she noticed no smoke or felt no heat until after the explosion, and therefore there would have been no smoke to set off a functioning alarm. **However, such conjecture does not eliminate the reasonable inference that a working smoke alarm would have gone off.** (Emphasis added.)

Rozgay makes sweeping allegations that Hansen has no evidence to counter Williams or to cause reasonable minds to disregard Williams' conclusory statements. Hansen is entitled to all of the following inferences:

- Dr. Williams claims to be the attending physician of Barbara and Clarence. It is reasonable to infer Dr. Williams saw them only in the confining laboratory environment of an examination room, not the real world.
- Dr. Williams makes no reference to the testimony of the professional 24/7 caregivers. The reasonable inference is, Dr. Williams was unaware of the conduct attributed to Clarence and Barbara outside of the examination room.
- Dr. Williams claims he relied on a mini-cognitive test in 2009. The professional caregivers testify concerning 2010 (the relevant period). Hansen is entitled to a reasonable inference that Dr. Williams lacks direct knowledge of the condition of Clarence and Barbara in 2010.
- Within weeks after executing the documents, Clarence and Barbara were institutionalized in Overlake's Memory Loss Care Unit. The inference is that institutionalization in a memory loss care unit was necessary. Dr. William identifies no change in the condition of Barbara and Clarence between the time they sign the documents and the time they were admitted to memory loss care unit. Hansen is entitled to the reasonable inference Clarence and Barbara were in substantially the same condition when they sign the documents as when they were admitted to the institution.

Rozgay agrees Hansen is entitled to all of these inferences because his

Response states at 36:

Long-standing Washington precedent provides that factual issues may be decided on summary judgment “**when reasonable minds could reach but one conclusion from the evidence presented.**” (Emphasis added.)

Van Dinter v. City of Kennewick, 121 Wn.2d 38, 47, 846 P. 2d 522 (1993) (quoting *Cent. Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 353, 779 P. 2d 697 (1989)).

Relying on the authority cited by Rozgay: Hansen respectfully submits: A reasonable person could conclude a man who mowed the street could not comprehend the conversion of separate property to community property. A reasonable person could conclude a couple, who could no longer visit their Hood Canal home, could be duped or frightened that it would crumble and immediately gift the house. A reasonable person could believe that a woman who could not pay a utility bill without detailed coaching could not knowingly transfer her LLC membership. A reasonable person could determine Dr. Williams lacked sufficient facts to express credible conclusions.

CONCLUSION

Respondents’ Brief (25) argues that Hansen “attempts to move the finish line, asserting that Clarence and Barbara Rozgay must be shown to have possessed both testamentary and transactional capacity.” In truth,

The finish line never moved; Rozgay was litigating a will contest when Hansen's litigation challenged non-testamentary conveyances.

Rozgay must have realized Clarence and Barbara had no meaningful conception of what they signed and what they gifted on December 27, 2010. After Barbara signed the documents, Barbara asked caregiver Loveless what the documents meant (CP 667-668). Regarding the envelope of documents Barbara asked: "What am I supposed to do with these? What are they?" (CP 671-672) Recognizing that the capacity to execute transactional documents, make gifts and execute other transactional documents could not be established, Rozgay relabeled the action a "will contest," disregarding the true nature of the action.

Due to the reply page limitation, Hansen has not addressed every Assignment of Error or Issue presented in her Opening Brief. Selective omission is not abandonment as to any Assignment of Error. Hansen respectfully requests vacation of the dismissal on summary judgment, vacation of the judgment awarding attorney's fees and costs incident to the summary dismissal and remand for trial.

Dated this 6th day of September, 2016.

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(2016.09.05 Hansen Reply Brief)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

KIMBERLY A. HANSEN, as her separate
estate, formerly known as KIMBERLY
ROZGAY,

Plaintiff,

v.

MARK A. ROZGAY, individually and in his
capacity as Personal Representative Estate of
BARBARA ROZGAY, Trustee of the
CORDES TRUST, ROZGAY FAMILY
INVESTMENTS, LLC, a Washington
Limited Liability Company and the marital
community of MARK ROZGAY AND
BABBI ROZGAY, Husband and Wife,

Defendants.

No. 14-2-33748-5 SEA

Court of Appeals, Division One
No. 74636-7-1

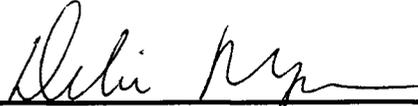
DECLARATION OF SERVICE

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON

DECLARATION OF SERVICE

I certify that on September 6, 2016, I sent a copy of the Appellant's Reply Brief to Respondents' attorney Scott M. Ellerby, via email to sellerby@ballardlawyers.com. Counsel for the parties have stipulated to service of all pleadings and correspondence via email.

DATED this 6th day of September, 2016 at Redmond, Washington.



Debi Ryan, Legal Assistant

(09022016 Hansen Dec of Svc)

DECLARATION OF SERVICE

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