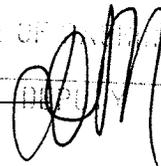


COURT OF APPEALS
DIVISION II OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____



Original

JAY T. FERGUSON and KELLY L. FERGUSON,
husband and wife, and the marital community composed thereof

Appellants

v.

TIMOTHY D. PASCHAL,
as personal representative of the Estate of Kathryn E. Kurtz,

Respondent

Appellate Cause No. 38579-1-II
Appeal from the Superior Court of Kitsap County, Washington, Case No. 07-2-02814-7

BRIEF OF APPELLANT
(Amended)

Richard T. Roats, ROATS LAW OFFICE, PLLC
Attorney for JAY T. FERGUSON and KELLY L. FERGUSON, as Appellants

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I. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in granting Plaintiff's motion to strike, by order entered on June 13, 2008.
2. The trial court erred in denying Defendant's motion for reconsideration by order entered on September 19, 2008.
3. The trial court erred in granting Plaintiff's motion for summary judgment by order entered on October 17, 2008.

Issues Pertaining to Assignments of Error

1. Whether reasonable persons could differ in determining whether the note was modified, when the evidence demonstrates that the parties intended to modify the note and their conduct was consistent with this intent.
2. Whether the statements in Jay T. Ferguson's affidavit fell within the definition of "hearsay."

II. STATEMENT OF THE CASE

Statement of the Procedure Below

November 29, 2007: Plaintiff Timothy D. Paschal, as Personal Representative of the Estate of Kathryn E. Kurtz ("Plaintiff") filed a complaint for breach of contract against Defendant Jay T. Ferguson and Kelly L. Ferguson ("Defendants") (Clerk's Papers ("CP") 1).

February 29, 2008: Defendants filed their answer (CP 7).

April 29, 2008: Plaintiff filed its motion for summary judgment and memorandum in support thereof (CP 9-10).

May 20, 2008: Defendants filed their reply to the motion for summary judgment and their memorandum in support thereof (CP 25).

June 4, 2008: Plaintiff filed a motion to strike portions of the declaration of Jay T. Ferguson (CP 33).

June 13, 2008: a hearing was held regarding the motion for summary judgment and the motion to strike. This was the first time Defendants' attorney Richard Roats received notification of the Motion to Strike. The court below granted the motion to strike (CP 38).

June 18, 2008: Defendants filed a motion to reconsider and memorandum in support of their objection to Plaintiff's motion to strike (CP 41).

June 23, 2008: with regard to Defendants' attorney Richard Roats' failure to receive the motion to strike, Plaintiff filed a Declaration of Nathaniel M. Berwind (CP 48).

June 24, 2008: Defendants filed a response to Plaintiff's declaration (CP 53).

August 1, 2008: Plaintiff filed a memorandum in response to Defendants' motion to reconsider (CP 55).

September 19, 2008: the court below denied Defendants' motion to reconsider (CP 67).

October 17, 2008: the court below held a hearing on Plaintiff's motion for summary judgment and granted the motion (CP 74-77).

December 15, 2008: Defendants perfected their appeal to this Court (CP 78-80).

Statement of the Facts Relevant to the Issues Presented for Review

Defendants and appellants Jay T. Ferguson and Kelly L. Ferguson negotiated an \$80,000 note to Mr. Ferguson's grandmother (now deceased) Kathryn Kurtz. (see CP 10-14, Ex. A to the MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT). ("The note"). Under the note, the Fergusons were to pay Ms. Kurtz monthly installments of \$1,625 until they had paid Ms. Kurtz \$80,000 plus 8% interest. In the case of a default, the note provided an acceleration clause and increased

the amount of interest to 12% per annum. The note also provided that an extension on the time for payment was permissible.

After Ms. Kurtz passed away, Timothy Paschal served as personal representative of the Estate. Under the original terms of the note, payment on the note would have been past due. The Estate sought an order of default, and Defendants countered that the note's terms were modified. As evidence, Defendants presented the following written message from Ms. Kurtz:

I read your little red note, Jay. Are you having trouble with the size of the payments, the interest, or what? Let me know if it is something I can help with. I suppose the jobs got fewer as the weather gets worse. You are very important to me, all 4 of you.

(CP 55-66, Ex. B-1 and B-2 to PLAINTIFFS' MEMORANDUM IN RESPONSE TO DEFENDANTS' MOTION FOR RECONSIDERATION AND MOTION TO DENY SUMMARY JUDGMENT).

Subsequent to this letter, Defendants reduced their payments, and Ms. Kurtz never objected (see CP 10-14, p. 2 of MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT). In addition to Ms. Kurtz' written message, Defendants also presented an affidavit of Jay Ferguson that included the following statements:

3. I was having a difficult time making the payments on the loan so I spoke with my grandmother about it;
4. As a result of the conversation with my grandmother, she agreed to modify the agreement and accept payment of the principal amount loaned and waive all interest.
5. I have paid \$35,750.00.

6. Pursuant to the modified agreement, I owe the amount of \$44,250.00. (CP 26-32, Ex. A to DEFENDANT'S MEMORANDUM IN SUPPORT OF RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT).

Plaintiff argued that the trial court should strike paragraphs 4 and 6 of the affidavit, contending that they are hearsay and violations of the dead man's statute (CP 33-37, p. 1 of PLAINTIFF'S MOTION TO STRIKE PORTIONS OF THE DECLARATION OF JAY T. FERGUSON). The trial court granted Plaintiff's motion to strike only on the basis of hearsay:

THE COURT: Okay. I'm going to grant the motion to strike paragraphs four and six, as they are hearsay.

Accordingly, Defendants appeal the trial court's ruling.

(see VERBATIM REPORT OF PROCEEDINGS, June 13, 2008, P. 6, ll. 14-15).

III. SUMMARY OF THE ARGUMENT

Regardless of the trial court's ruling on the motion to strike, sufficient evidence exists to withstand summary judgment, as a reasonable fact-finder could reach a conclusion contrary to that of the trial court.

Moreover, the trial court should have denied Plaintiff's motion to strike two paragraphs of Jay T. Ferguson's affidavit. Its decision was based entirely on a determination that the statements were hearsay. However, the statements did not meet the general definition of "hearsay," and even if they did, they were specifically excluded from the general "hearsay" definition as admissions of a party opponent. ER 801(d)(2).

IV. ARGUMENT

- A. THE TRIAL COURT ERRED IN ITS SUMMARY JUDGMENT RULING BECAUSE THERE EXISTED A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE NOTE WAS MODIFIED.

Standard of Review

A Summary Judgment ruling is reviewed *de novo*. Potter v. Washington State Patrol, 196 P.3d 691, 696 (Wash. 2008). The facts and all reasonable inferences therefrom are viewed in the light most favorable to the nonmoving party. Carver v. State, 197 P.3d 678, 680 (Wash. 2008). “To prevail on summary judgment, the moving party bears the burden of showing the absence of a genuine issue of material fact.” Mason v. Kenyon Zero Storage, 856 P.2d 410, 413 (Wash. 1993). The nonmoving party will withstand summary judgment even if the moving party meets its burden, so long as the nonmoving party presents evidence that demonstrates that material facts are in dispute. Calhoun v. State, 193 P.3d 188, 192 (Wash. 2008). Finally, an “**appellate court must reverse summary judgment if the evidence could lead reasonable persons to reach more than one conclusion.**” Soproni v. Polygon Apt. Partners, 971 P.2d 500, 504 (Wash. 1999) (emphasis added).

Application

A genuine issue of material fact exists based on the following facts:

- (1) Ms. Kurtz indicated her intent to assist Mr. Ferguson with the payments, (see CP 55-66, Ex. B-1 and B-2 to PLAINTIFFS’ MEMORANDUM IN RESPONSE TO DEFENDANTS’ MOTION FOR RECONSIDERATION AND MOTION TO DENY SUMMARY JUDGMENT)
- (2) This intent was corroborated by the fact that Mr. Ferguson actually paid less than the amount required by the note (see CP 10-14, p. 2 of MEMORANDUM IN SUPPORT OF PLAINTIFFS’ MOTION FOR

SUMMARY JUDGMENT), and

- (3) Ms. Kurtz never attempted to enforce the terms of the note (as it existed pre-modification), as evidenced by the fact that this action was instituted after her death (see CP 1-6, COMPLAINT FOR BREACH OF CONTRACT).

Viewed in the light most favorable to Defendants, these facts establish a genuine issue of material fact as to whether the contract was modified.¹ The majority common law rule holds that “even where the contract specifically states that no non-written modification will be recognized, the parties may yet alter their agreement by parol,” because of “the notion that contracting parties cannot today restrict their own power to contract with each other tomorrow.” JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 5.14(b) (5th ed. 2003). Oral modifications to written contracts therefore are permissible.

A reasonable person could conclude that Ms. Kurtz and Mr. Ferguson modified the note, based on Ms. Kurtz’ indication that she would assist Mr. Ferguson, coupled with the consistent subsequent actions by both parties. In fact, given the above facts, it is *more likely than not* that the note was modified. It therefore cannot rationally be maintained that a fact-finder would be *unreasonable* in concluding, based on the above evidence, that the note had been modified. At the very minimum, a genuine issue of material fact exists and summary judgment therefore was premature, regardless of the

¹ Recall that the trial court did not strike the message from Ms. Kurtz but rather two paragraphs from Mr. Ferguson’s affidavit. (VERBATIM REPORT OF PROCEEDINGS, June 13, 2008, P. 6, ll. 14-15).

motion to strike discussed *infra*.

- B. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION TO STRIKE, AS THE STRICKEN PORTIONS WERE NEITHER HEARSAY NOR BARRED BY WASHINGTON'S DEAD MAN'S STATUTE.

Standard of Review

“Ordinarily, evidentiary rulings are reviewed for abuse of discretion. However, ‘[t]he de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.’” Momah v. Bharti, 182 P.3d 455, 465 (Wash. 2008) (quoting Folsom v. Burger King, 958 P.2d 301 (1998)).

Legal Framework

Hearsay

Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). Therefore, if the statement was not used for the truth of the matter asserted, it is not hearsay.

Dead Man's Statute

Legal scholars have referred to the roots of dead man's statutes as “specious” and have stated that “most commentators agree that the expedient of refusing to listen to the survivor is, in Bentham's words, ‘blind and brainless’. In seeking to avoid injustice to one side, the statutory drafters ignored the equal possibility of creating injustice to the other.” KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 65 (6th ed. 2006). This repugnant scenario is exactly what would occur under Plaintiff's previously proposed application of Washington's dead man's statute. Fortunately, the statute does not apply in such a manner.

Washington's method of statutory interpretation was explained in State v. M.C., 201 P.3d 413, 415 (Wash. 2009):

Statutory interpretation is a question of law that we review *de novo*. In interpreting statutory provisions, the primary objective is to ascertain and give effect to the intent and purpose of the legislature in creating the statute. To determine legislative intent, we look first to the language of the statute. If a statute is clear on its face, its meaning is to be derived from the plain language of the statute alone. Legislative definitions included in the statute are controlling, but in the absence of a statutory definition this court will give the term its plain and ordinary meaning ascertained from a standard dictionary. A statute is unclear if it can be reasonably interpreted in more than one way. However, it is not ambiguous simply because different interpretations are conceivable. We are not obliged to discern any ambiguity by imagining a variety of alternative interpretations. An unambiguous statute is not subject to judicial construction. *State v. Watson*, 146 Wn.2d 947, 954-55, 51 P.3d 66 (2002).

Revised Code of Washington § 5.60.030, Washington's "dead man's statute," provides in relevant part:

in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person . . . then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased . . . person

Purposes of Washington's Dead Man's Statute

"One of the major purposes of this legislative enactment is to give protection to the writings and documents of a decedent or persons claiming thereunder, so that **decedent's purposes** in making a conveyance in writing will not be defeated by parol description of his acts and purposes after his death." Hampton v. Gilleland, 379 P.2d 194, 197 (Wash. 1963) (emphasis added).

Another purpose of the dead man's statute is to prevent interested parties from giving self-serving testimony about conversations or transactions with the decedent.

O'Conner v. Slatter, 93 P. 1078, 1079 (Wash. 1908).

Judicially Defined Statutory Terms

Party in Interest: “one who could gain or lose by the action in question.”

Wildman v. Taylor, 731 P.2d 541, 543 (Wash. 1987).

Adverse Party: “the party representing the deceased who is adverse to the ‘party in interest’ wishing to testify in his or her own behalf regarding a transaction or statement by the deceased.” Erickson v. Robert F. Kerr, M.S., P.S., 851 P.2d 703, 707 n. 2. (Wash. 1993).

Transaction: the doing or performing of some business or management of any affair. The test “is whether the decedent, if living, could contradict the witness of his own knowledge.” Estate of Shaughnessy, 648 P.2d 427, 429 (Wash. 1982).

Testify: “Evidence given by a competent witness under oath or affirmation; as distinguished from evidence derived from writings, and other sources. Testimony is a particular kind of evidence that comes to a tribunal through lay witnesses speaking under oath or affirmation.” Wildman, 731 P.2d at 544 (alterations omitted) (using Black's Law Dictionary 1324 (5th ed. 1979) to define “testifying”). As to “testify,” the Wildman court expanded thusly: “**The statute does not expressly prohibit the interested party from introducing documents or other written statements by the deceased which support a claim of ownership of property by the interested party against the deceased's estate.**” Id. (emphasis added).

Analysis

Hearsay

Below, Plaintiff contended that the note from Ms. Kurtz contained hearsay

because it included an out of court statement offered for the truth of the matter asserted (see CP 33-37, pp. 2-3 of PLAINTIFF'S MOTION TO STRIKE PORTIONS OF THE DECLARATION OF JAY T. FERGUSON). This argument will be addressed because Plaintiff made it below, and because the trial court granted the motion to strike without explanation (VERBATIM REPORT OF PROCEEDINGS, June 13, 2008, P. 6, ll. 14-15). The grounds for its hearsay ruling are therefore unknown.

The flaw in Plaintiff's argument is that it relies on the misguided assumption that the letter was being used for the truth of the matter asserted. It was not, and therefore the letter is not hearsay, a fact which eliminates any need for Defendants to prove the applicability of a hearsay exception. An analysis of the language in the relevant message reveals that it cannot reasonably be concluded that the message is being used to prove the truth of the matter asserted. In relevant part, the note reads:

I read your little red note, Jay. Are you having trouble with the size of the payments, the interest, or what? Let me know if it is something I can help with. I suppose the jobs got fewer as the weather gets worse. You are very important to me, all 4 of you.

(CP 55-66, Ex. B-1 and B-2 to PLAINTIFFS' MEMORANDUM IN RESPONSE TO DEFENDANTS' MOTION FOR RECONSIDERATION AND MOTION TO DENY SUMMARY JUDGMENT)

There are five sentences in this quoted paragraph. Each will be addressed.

- 1) *I read your little red note, Jay.* Nothing in the record suggests that Defendants are attempting to prove that Mr. Ferguson's grandmother read a little red note written by Mr. Ferguson.
- 2) *Are you having trouble with the size of the payments, the interest, or what?* As Plaintiff conceded below, this sentence "simply poses a question to the

Defendants.” (PLAINTIFFS’ MEMORANDUM IN RESPONSE TO DEFENDANTS’ MOTION FOR RECONSIDERATION AND MOTION FOR SUMMARY JUDGMENT, P. 6). Therefore, there is no “matter asserted” and the sentence cannot possibly be considered hearsay.

- 3) *Let me know if it is something I can help with.* Here, again, there is no “matter asserted.” Written in the imperative mood, this sentence is a command; it asserts nothing. Moreover, there is no truth value that may be assigned to this sentence. For example, no reasonable answer can be offered in response to the following: “True or false: Let me know if it is something I can help with.” Assigning a truth value to this sentence would be akin to stating that a truth value exists for the sentence “Take out the trash” or “Have a nice day.” It is not hearsay.
- 4) *I suppose the jobs got fewer as the weather gets worse.* The message clearly is not being used to prove that “the jobs got fewer as the weather gets worse.”
- 5) *You are very important to me, all 4 of you.* This statement, while certainly true, is not being used to prove the truth of the matter asserted.

Contrary to Plaintiff’s assertions below, the message contained no hearsay.

Likewise, the testimony that the trial court chose to strike was not hearsay.

Neither paragraph 4 nor paragraph 6 contains “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”

To the extent that the statements could be considered to fall under the general “hearsay” definition, the statements are specifically defined as “not hearsay” admissions by a party opponent under ER 801(d)(2):

A statement is **not hearsay** if . . . The statement is offered against a party and is (i) the party's own statement, in either an individual **or a representative capacity** or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject
....

(emphasis added).

Again, the trial court did not rest its decision on the dead man's statute. Instead, it ruled that the statements² were hearsay. Since the statements clearly are admissions by a party opponent, they are admissible as "not hearsay" and the trial court's ruling on the motion to strike should be reversed.

Dead Man's Statute

The dead man's statute will be addressed here, but it is relevant only if this Court elects to consider it despite the lower court's failure to do so.

Revised Code of Washington § 5.60.030 "is inapplicable to the introduction of written documentation, executed by the deceased, of a transaction or statement by the deceased." Wildman, 731 P.2d at 545. Therefore, the court in Wildman allowed into evidence a letter that read as follows:

Sorry things did not work out different, nobody wanted it to more than I did, life in the fast lane, I guess. Hope things work out better in the future for you than they have in the past. One is at the Alameda Truck Stop in Los Angeles. Two is at the El Paso Truck Stop in El Paso, Texas. Thanks a lot for giving me a chance, and again I'm sorry things didn't work out. Luck to you and take care of yourself.

As Always, Rick

Id. at 543.

² The stricken statements are again reproduced as follows:

4. As a result of the conversation with my grandmother, she agreed to modify the agreement and accept payment of the principal amount loaned and waive all interest.
6. Pursuant to the modified agreement, I owe the amount of \$44,250.00

Moreover, the Wildman court held that, with an adequate foundation, the party in interest (Mr. Wildman) could testify (1) that he received the letter; (2) as to whose signature was on the letter; and (3) as to his feelings or impressions of the letter. Id. at 545.

It necessarily follows, then, that the dead man's statute is no barrier to the admission into evidence of the message from Ms. Kurtz. The relevant portion of the letter states:

I read your little red note, Jay. Are you having trouble with the size of the payments, the interest, or what? Let me know if it is something I can help with. I suppose the jobs got fewer as the weather gets worse. You are very important to me, all 4 of you.

Therefore, Wildman permits Mr. Ferguson to testify that he received this letter, that his grandmother wrote it, and as to his feelings or impressions of the letter.

Moreover, In re Bushnell's Estate permits a party in interest to

testify that a written statement given [to the party in interest] . . . has since been lost, [because the] testimony of the witness in this regard was not offered to prove the receipt or contents of the instrument, but to show its loss and laying the foundation for the introduction of secondary evidence of its contents

182 P. 89, 90 (1919). In other words, one may introduce secondary evidence of the contents of an instrument and testify regarding what happened to it. Consequently, Defendants are permitted to testify regarding what happened to the note (it was modified), as well as introduce secondary evidence of its contents. The secondary evidence includes Ms. Kurtz' message to Defendants in which she indicated a willingness to eliminate the interest of the debt, as well as Defendants' subsequent consistent behavior.

Finally, a fundamental purpose of the dead man's statute would be undercut

completely if it worked to exclude the message written by the decedent, as well as all evidence corroborating the statements therein. The dead man's statute is supposed to *protect* the decedent's wishes, not subvert them. It is clear from the evidence that Ms. Kurtz desired to assist her grandson Mr. Ferguson, yet under Plaintiff's previously suggested application of the statute, the exact opposite result would become reality and the dead man's statute's fundamental purpose would be wiped out.

V. CONCLUSION

For the foregoing reasons, the trial court's summary judgment ruling should be reversed, and this case should be remanded for further proceedings.

Respectfully submitted,



Richard T. Roats
Attorney for Appellant
WSBA # 37765

PROOF OF SERVICE

The undersigned hereby certifies that I am an attorney at law for Roats Law Office, PLLC. I am a citizen of the United States and a resident of the state of Idaho. I am over the age of 18 years, and not a party to this action.

Pursuant to RAP 18.5(a), on April 29, 2009, I served a true and correct copy of Appellant's Opening Brief and this Proof of Service on the following parties in the manner shown below:

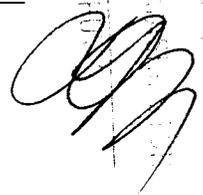
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- Via United States Mail
- Via Legal Messenger
- Via Facsimile
- Via Email

DATED this 29th day of April, 2009, at Boise, Idaho.



Richard T. Roats
Roats Law Office, PLLC

BY  DEPUTY
STATE OF IDAHO
09 MAY -6 AM 9:52
COURT OF APPEALS
DIVISION II