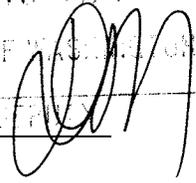


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DIVISION II

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DIVISION II OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
BY _____



38579-1-II

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,

Respondents

Original

REPLY BRIEF OF APPELLANT

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P.M. 7-9-09

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I. ANALYSIS

A. The Lower Court Erred in Ruling that the Relevant Statements are Hearsay.

1. Appellants may Argue the Hearsay Issue on Appeal.

Plaintiffs claim that this Court cannot consider the hearsay arguments on appeal (Resp't Br. 14), even though the lower Court's ruling was based on hearsay. Their cited case law does not support their contention. John Doe v. Blood Center 819 P.2d 370, 780 (1991) relied on Talps v. Arreola, 521 P.2d 206 (1974), which stands for the proposition that a theory will not be considered if the *issue* were not presented below. Id. at 658 (“We will not consider a theory as ground for reversal unless we can ascertain from the record that the issue was first presented to the trial court.”).

The issue is whether the relevant statements were hearsay. The judge ruled that the statements were hearsay, and Plaintiffs are now contending that they were not hearsay. As Plaintiffs admitted (Resp't Br. 24 n. 9), Defendants have not argued that an exception to the hearsay rule applies; instead, they have argued that the judge erred when she ruled that the statements were hearsay. Therefore, the precise issue below is squarely before this Court today.

2. Paragraphs 4 and 6 are not Hearsay, as they Contain Admissions by a Party Opponent.

Plaintiffs maintain that the “admission by a party opponent” exclusion is inapplicable, based on their incorrect conclusion that decedent was not a “party.” (Resp't Br. 22). Revised Code of Washington § 11.48.090 contradicts Plaintiffs' position. It states that “all actions founded upon contracts[] may be maintained by and against personal representatives in all cases in which **the same might have been maintained by**

and against their respective testators or intestates.” (emphasis added). Clearly, the action at bar is derivative of the action that could have been brought by decedent. In such cases, “[t]he **survivors thus occupy the decedent’s legal shoes**. Any defense that would have defeated a . . . claim during his lifetime likewise vanquishes their claims.” Delesma v. City of Dallas, 770 F.2d 1334, 1338 (5th Cir. 1985) (emphasis added); *see also* Fields v. Legacy Health System, 413 F.3d 943, 957 (9th Cir. 2005) (holding that an Oregon statute granting a derivative right to sue “essentially places a decedent’s personal representative in the decedent’s shoes, **imputing to the representative whatever rights and limitations to those rights the decedent himself possessed.**”) (emphasis added), and Lahue v. Keystone Investment Co., 6 Wn.App. 765, 779 (holding that shareholders’ derivative suits are subject to the same defenses that could have been asserted against the corporation itself).

Therefore, if Plaintiffs wish to maintain this derivative action, they must take the good with the bad. They must accept that they are bound by the same limitations that would have bound decedent. In this case, the decedent would have been bound by Evidence Rule 801(d)(2), which excepts admissions by a party opponent from the “hearsay” definition. The estate steps into the shoes of decedent, as if decedent herself had brought the claim. Had decedent brought the claim, she would have been subject to the “admission by a party opponent” component of hearsay. Paragraphs 4 and 6 therefore are admissible as admissions by a party opponent.

3. Decedent’s Letter to Defendant is Not Hearsay.

First, because admissions by decedent are admissible in this case, and because the letter constituted an admission by a party opponent, it is admissible in its entirety.

Second, Plaintiffs essentially concede that the sentences contained within the letter are not hearsay. The only statement that arguably is hearsay is “I read your little red note, Jay,” but, as stated previously, nothing suggests that Defendant is attempting to prove that a little red note was read by decedent. Plaintiffs claim that the question “Are you having trouble with the size of the payments, the interest, or what?” is used to prove that decedent “was aware that Ferguson was having difficulty with the terms of the Note/repayment.” (Resp’t Br. 21). Of course, “awareness” is not a “statement” that can be offered for its truth. At most, it relates to her state of mind, which is explicitly excepted under Evidence Rule 803(a)(3). Finally, the statement “Let me know if it is something I can help with” is not hearsay because it does not assert truth and therefore cannot be used for the truth of the matter asserted.

B. The Deadman’s Statute does not Bar Admission of the Evidence.

As previously stated, this issue is only relevant if this Court elects to consider it despite the lower court’s failure to do so.

Again, this claim is a derivative claim. If decedent had brought this claim herself, she could not have asserted the applicability of the deadman’s statute. Therefore, Plaintiffs cannot assert it either. This conclusion is consistent with the disfavored status of the deadman’s statute, given its tendency to eliminate relevant and reliable evidence.

The Wildman and Bushnell cases are dispositive here. Wildman permits documentary evidence to be admitted, and Bushnell permits testimony for the purpose of demonstrating what happened to a written statement, as well as for the purpose of providing a foundation for introducing secondary evidence of the contents. Wildman v. Taylor, 731 P.2d 541, 544 (Wash. 1987), In re Bushnell’s Estate, 182 P. 89, 90 (1919). It

therefore is permissible for Defendant to testify as to what happened to the note (modification), and to provide secondary evidence of its contents (the letter and statements contained in paragraphs 4 and 6). Therefore, the letter and statements are admissible.

C. The Statute of Frauds Issue Should not be Considered.

The statute of frauds issue was not raised below and therefore should not be considered. Plaintiffs do not cite where they raised the issue below, because the issue was not raised below. Although they brought the motion for summary judgment, they failed to make the argument they now present.

Regardless, Plaintiffs concede that a contract subject to the statute of frauds may be modified orally with the existence of part performance. (Resp't Br. 37). Defendant already has stated that payments were made after the modification. (Appellant Br. 3; CP 10-14). Even if the payments were of the same amount as those previously made, that fact does not negate the fact that the payments served as partial performance of the modified agreement. The statute of frauds therefore is not an issue.

D. Summary Judgment Was Prematurely Granted.

The letter and Paragraphs 4 and 6 are clearly admissible as admissions by a party opponent. Given their admissibility, there is evidence sufficient to justify a reasonable fact-finder in concluding that the contract was modified. Decedent indicated a willingness to assist Defendant; Defendant testified that the contract was modified; and Defendant's subsequent conduct is consistent with this testimony. Summary judgment was not appropriate at that stage. Even if paragraphs 4 and 6 were not admissible, summary judgment would have been improper, considering that decedent indicated a

willingness to help Defendant, and Defendant subsequently acted as though she had agreed to help him. A fact-finder would not be unreasonable in concluding that, based on that evidence, that the contract was modified.

II.

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,



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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 July 9, 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 9th day of July, 2009, at Boise, Idaho.



Richard T. Roats
Roats Law Office, PLLC

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