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COURT OF APPEALS

10 JUN 22 AM 10:16

STATE OF WASHINGTON

BY 

No. 40219-0-II

**IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

**JAMES BRETT CULPEPPER,
Plaintiff- Appellant**

VS

**FIRST AMERICAN TITLE INSURANCE COMPANY,
and HOLLIS MITSUNAGA, a single individual,
Defendants- Appellees**

**APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR THURSTON COUNTY**

THE HONORABLE THOMAS McPHEE

BRIEF OF APPELLANT

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ORIGINAL

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ASSIGNMENT OF ERROR

ASSIGNMENT OF ERROR

1. The trial court erred in dismissing the claim of the Plaintiff, James B. Culpepper against the Defendant Hollis Mitsunaga, with prejudice, and awarding statutory attorney fees in the amount of \$200.00 to Mitsunaga.

2. The trial court erred in granting judgment in favor of First American Title Insurance Company dismissing Plaintiff's complaint against First American Title Insurance Company with prejudice and awarding \$200.00 statutory attorney fees.

3. The trial court erred in not awarding judgment in favor of James B. Culpepper against First American Title Insurance Company.

4. The trial court erred in not entering judgment in favor of James B. Culpepper against Hollis Mitsunaga based upon a claim of unjust enrichment or upon a claim of restitution.

5. The trial court erred in entering finding of fact 16 because it was not supported by the record and evidence.

6. The trial court erred in entering finding of fact 18 because it was not supported by the record and evidence.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did First American breach its agreement with Culpepper entitling him to recover completely from First American for the amount he paid Mitsunaga?

2. Was the evidence produced at time of trial by James B. Culpepper sufficient to prove his claim for damages against First American Title Insurance Company.

3. Does the agreement between Ms. Mitsunaga and Mr. Culpepper, pursuant to which Mr. Culpepper paid Ms. Mitsunaga \$55,000.00 from the sale proceeds of the Budd Street home, constitute an accord and satisfaction over a bonafide dispute as to the value of work done by Ms. Mitsunaga on the Budd Street home?

4. Was Mitsunaga unjustly enriched by receipt of the payment of \$55,000.00 such that Culpepper is entitled to recover against her for return of said payment.

STATEMENT OF THE CASE

For a period of approximately four years ending at the end of the year 2005, James B. Culpepper (hereinafter "Culpepper"), and Hollis Mitsunaga (hereinafter "Mitsunaga") were involved in a relationship. (RP 60) During their relationship they did not live together but did spend significant amount of time together. (RP 64) During the relationship Culpepper lived first in the Mukilteo, Washington area and then in the Edmonds, Washington area. (RP 62-63) In Edmonds, Culpepper lived in a home he was purchasing which required a monthly payment, including mortgage, interest, taxes and insurance of approximately \$3,000.00 per month. (RP 63)

At all times Mitsunaga resided in a home she owned in Olympia, Washington. (RP-63)

As the relationship between Culpepper and Mitsunaga became closer, they discussed the possibility of acquiring a home and living together in that home. (RP 64) In their discussions relative to purchasing a home together Culpepper and Mitsunaga contemplated that Mitsunaga would use equity in her home as part of the down payment. (RP 64-66)

In June, 2004, Culpepper and Mitsunaga entered into a Residential Real Estate Purchase and Sale Agreement to jointly purchase property located at 6929 Budd Street NW, Olympia, Thurston County, Washington. (Ex.2) The home was to be purchased from Kathryn Ellis, Trustee in Bankruptcy. (Ex.2) Culpepper and Mitsunaga, in signing the Purchase and Sale Agreement agreed that they would acquire title as "joint tenants in common." (Ex.2)

After the Purchase and Sale Agreement (Ex.2) had been signed, it was discovered that Mitsunaga could not obtain a home equity loan on her property and thus would not be able to contribute to the purchase price of the home. (RP 67) Because of Mitsunaga's inability to contribute funds for the purchase of the home Culpepper did not want to acquire title to the property as joint tenants in common. (RP 66) Pursuant to their agreement, Culpepper and Mitsunaga initialed an Addendum to the Purchase and Sale Agreement which provided that: "Purchaser to take title as James B Culpepper, a single person." (Ex.7) The

addendum to purchase was also initialed by Kathryn Ellis, the bankruptcy Trustee. (Ex.8)

Signing of the Addendum (Ex.7) caused a break up in the relationship between Culpepper and Mitsunaga. (RP 71-72) This break up lasted for less than two months. (RP 72)

Pursuant to the Purchase and Sale Agreement (Ex.2) First American Title Insurance Company (hereinafter "First American") was selected as the closing agent. (Ex.2) The closing officer for the transaction was Diane Hart. (RP 33) Diane Hart worked at and from the Lynnwood, Washington office of First American. (RP 33) In processing this transaction, Diane Hart prepared or was responsible for preparation of all documents except for the Quit Claim Deed from the Trustee. (RP 38; RP 46)

In the course of closing the transaction, First American received the Purchase and Sale Agreement including the Addendum which changed the buyer from Culpepper and Mitsunaga as joint tenants to Culpepper, a single person. (RP 35) Diane Hart prepared a number of documents related to the purchase transaction including Escrow Instructions (Ex.17), a Real Estate Excise Tax Affidavit (Ex.18) and a Limited Practice Officer's Disclosure form. (RP 38) Each document prepared by First American and Diane Hart provided that the purchaser in the transaction was to be only James Brett Culpepper. In fact, the escrow instructions specifically provided that the conveyance of the property was to be from Kathryn Ellis, Trustee, to James Brett Culpepper, an unmarried

man as his sole and separate property (Ex.17-page 1) the same is true of the real estate excise tax affidavit. (Ex.8) In fact, a review of all documents clearly indicates that at all times Diane Hart knew that title to the property was to be conveyed to James Brett Culpepper, an unmarried man as his sole and separate property. (See generally Ex. 11, 13, 14, 15, 16, 18 and 19) Diane Hart also processed documents prepared by the bank which was lending Mr. Culpepper the necessary funds to acquire the property and all of these documents clearly indicated that the purchaser was to be only James Brett Culpepper. (Ex. 11, 13 and 14)

As previously noted the closing of the transaction was handled by Diane Hart in the Lynwood office of First American. However, because the property was located in Thurston County, the Olympia, Washington office of First American was involved in the transaction and in the closing of the transaction. (RP 33-34) In transferring the necessary documents to Olympia, Diane Hart prepared closing and recording instructions. (Ex.19) In the closing/recording instructions it directs the Olympia office of First American to issue a title insurance policy showing title in the name of James Brett Culpepper, an unmarried man as his sole and separate property. (Ex.19)

The only relevant document which was not prepared by either the lender or First American was the Quit Claim Deed. That document was prepared by Kathryn Ellis, the Trustee in bankruptcy who was selling the property as Trustee. (RP 46)

Shortly before the actual closing of the transaction, Diane Hart sent documents Kathryn Ellis to be signed by her. (Ex.16; RP 40) In exhibit 16 Diane Hart requests that Kathryn Ellis send the Quit Claim Deed directly to "Title," which referred to the Olympia office. (RP 41) In fact, the Olympia office was provided the original Quit Claim Deed directly from Kathryn Ellis. (RP 41)

Diane Hart did not obtain a copy of the Quit Claim Deed which had been prepared by Kathryn Ellis. (RP 41) The Quit Claim Deed itself named James Culpepper and Hollis Mitsunaga, joint tenants in common. (Ex.9) Had Diane Hart reviewed a copy of the Quit Claim Deed she would have noted that it was incorrect. (RP 44) In fact, as between First American, the seller, and the purchaser, Diane Hart testified that it was her responsibility and the responsibility of title, (Olympia office) to review the documents to insure that they were accurate. (RP 44) To be fair she also testified that it was also the responsibility of individuals involved in the transaction to examine the documents. (RP 44) However, Diane Hart did not have any indication in the records or of her own knowledge that James Culpepper had ever been given an opportunity to review the Quit Claim Deed prior to its recording. Mr. Culpepper, when he signed all of the closing documents was not given an opportunity to review the Quit Claim Deed. (RP 72) In fact, he first saw the Quit Claim Deed at time. (RP 72) In conjunction with the closing, Culpepper contributed a downpayment of \$118,000 (RP 71) in addition to an earnest money deposit of \$10,000. (Ex. 14)

After all closing documents, including the Escrow Instructions (Ex.17) and the Closing/Recording Instructions (Ex.19) were forwarded to the Olympia office of First American Title, that office did not follow the instructions in that it did not issue a title insurance policy in the name of James Brett Culpepper as his sole and separate property. (RP 41-42) In fact, Diane Hart testified that the Olympia office did not follow her instructions. The title to the property as shown on the Quit Claim Deed (Ex.9) shows the name of James Culpepper and Hollis Mitsunaga as joint tenants in common as owners of the property. The Quit Claim Deed was recorded by First American on September 1, 2004. (Ex.9)

After the purchase transaction was completed, on September 2, 2004, Mr. Culpepper did not discover that title of the property had been taken in the joint name with Mitsunaga until approximately January or February, 2006. (RP 79) He found out that the title was in both names from his realtor, Spence Weigand. (RP 78)

After Mr. Culpepper had purchased the Budd Street home he began a project of gutting and restoring the home. (RP 73) During that period of time no one lived in the home. (RP 73) After the home was purchased Mitsunaga did not contribute any money for the monthly payments, real property taxes, or insurance. (RP 74-75) Contractors were hired to do work on the house to improve the roof, the interior, to install granite counters and cabinets and for flooring work. Culpepper expended approximately \$75,000.00 in payments to

contractors for improvements to the house. (RP 75) Mitsunaga did not contribute any money to the contractors or for materials. (RP 75)

Mitsunaga did help Mr. Culpepper in his efforts to improve the house by doing cleanup chores and other "gofer errands" when needed. (RP 75-76) Mitsunaga also helped with some painting as well as taping in preparation for painting. (RP 76) During this period of time when the house was being remodeled, Mr. Culpepper also paid for or accomplished a number of repairs on the home owned by Mitsunaga. (RP 76-77). Repair costs expended by Mr. Culpepper was in the neighborhood of \$1,000.00 to \$1,200.00. (RP 78) He also expended a great deal of time and labor in cleaning and painting as well as fixing equipment at her home. (RP 78)

Culpepper summarized his efforts in working on the home compared to Mitsunaga's efforts, and also summarized his financial contributions. (RP 229-235) The review of that testimony establishes clearly that Culpepper contributed 100% of the financial responsibility of the property including payment of the house payments, taxes, insurance, contractor work, and lawn care services. (RP 229-235) As far as efforts, Culpepper testified that he was working on the home every weekend but that Mitsunaga was involved in other activities with her family so that she was at the house for only a third of the time that he was there working on the house. (RP 231-232) The tasks performed by Mitsunaga were minimal in comparison and included riding a tractor once, helping with clean up of leaves, stacking wood, staking tiles, and sanding drywall. (RP 230-231)

During the period after the home had been purchased and before the end of 2005, Mr. Culpepper testified that there were many occasions when Mitsunaga would acknowledge that the home belonged to him and that he could do whatever he wanted to do with it. (RP 74; RP 79)

At the end of the year 2005 and the early part of 2006, Culpepper was looking for different employment which he finally located in the State of California. (RP 80-81) In January, 2006, he severed his relationship completely with Mitsunaga in a termination which he testified was shocking to her. (RP 82-83) She was very angry at him. (RP 83) This last termination had actually been coming on for a while in that in the fall of 2005 Mitsunaga had told him she had returned an engagement ring to him and had left it in the house on Budd Street. (RP 83)

After finding out that title to the Budd Street house was in his name and the name of Mitsunaga, Culpepper approached Mitsunaga and asked her to sign a Quit Claim Deed (RP 85) Their discussions were heated and Mitsunaga was very angry and Mr. Culpepper testified that she did not want to help him in any way. (RP 85)

Eventually, Mitsunaga brought up the subject of money and told Mr. Culpepper that "I'll only sign the Quit Claim Deed if you give me money from the home." (RP 86) Mr. Culpepper testified that at no time did she make a claim of ownership, or ownership interest to or in the house. (RP 86-87) During the early part of 2006, after Mr. Culpepper had moved to the State of California, he was

making payment of approximately \$3,000.00 on his home in Edmonds, Washington, approximately \$3,000.00 on the Budd Street home, and approximately \$1,800.00 of rent in Monterey, California. (RP 81-82) In fact, because of the monthly payments on the two home owned by him and his rental and living expenses in Monterey, he was not coming close to meeting his monthly obligations and had to sell some stock. (RP 84)

After the early 2006 discussions with Mitsunaga regarding a Quit Claim Deed on the Budd Street property, Mr. Culpepper received an offer to purchase the Budd Street house on or about April 18, 2006. (RP 87)

The offer received by Culpepper for the Budd Street home was a good one and one which he thought he could not afford to turn to down. (RP 88) Because Mitsunaga's name was on the title and title to the property could not be transferred without her cooperation, Culpepper agreed to pay her \$55,000.00 to participate in the sale. (RP 87-88) Culpepper did so because he was in dire financial distress because he could not afford to maintain the purchase of two homes plus rental on a third. (RP 88) The payment of the \$55,000.00 to Mitsunaga was for her cooperation in processing and participating in the closing of the transaction by which Culpepper was selling the home to the buyer. (RP 104; 112-113; and 131-132) Mr. Culpepper testified that Mitsunaga, in their discussions, did not claim an ownership interest in the Budd Street home, rather she refused to cooperate in the closing of the sale of the home unless she was paid a certain amount of money. (RP 86-87)

Culpepper believed that he could not afford to lose the sale because of his dire financial condition. (RP 88)

Mitsunaga, in her testimony on direct examination, testified that she was surprised that her name was on the title. (RP 183) In subsequent testimony she tried to alter her previous testimony by saying that she was surprised that she had been asked to take her name off of title. (RP 186) However, her testimony regarding her surprise was clear. It was:

“Q- Did you see a document that had the name Quit Claim Deed on it?

A- Yes

Q- Well, it was a surprise to you that you were on the title when he said, “Oh, you’re on title?”

A- Yes, it was. I wasn’t that concerned about it because we were together and moving in the house soon, and I just thought it was odd that he brought it up, just more odd than anything.” (RP 183)”

The sale of the Budd Street home did occur and Mitsunaga was in fact paid \$55,000.00. (RP 147)

ARGUMENT

A. FIRST AMERICAN TITLE INSURANCE COMPANY BREACHED THE ESCROW INSTRUCTIONS.

The Escrow Instructions signed by Culpepper and Bankruptcy Trustee Kathryn Ellis include the following language:

Escrowee has been handed a copy of the Purchase and Sale Agreement or such other documents **and any Addendums**, as constitute the Agreement to sell and purchase this property. **Acting in accordance therewith**, Escrowee is directed to close the transaction

Sellers herein Deposit with you the following: . . . Quit Claim Deed executed by and between the following: Kathryn Ellis,

Trustee, to James Brett Culpepper, an unmarried man as his sole and separate property[.]

(Ex. 17 - Escrow Instructions, page 1 - emphasis added).

Whether designated as an escrow agent or escrow holder, First American was in a fiduciary relationship to the parties to the escrow. *National Bank of Washington v. Equity Investors*, 81 Wn. 2d 886, 910, 506 P.2d 20 (1973). In this case, the parties to the escrow were Culpepper and Kathryn Ellis. First American's duties to the parties were "those set out in the escrow agreement, and it was required to "comply strictly" with those duties, exercising "ordinary skill and diligence" and "conduct[ing] the affairs with which [it was] entrusted with scrupulous honest, skill, and diligence." *Id.* (quoting 30A C.J.S. Escrows § 8 (1965)).

The Escrow Instructions directed First American to "act[] in accordance" with the Purchase and Sale Agreement "and any Addendums" in closing the transaction. Title was not conveyed in accordance with the August 30, 2004 addendum. (Ex. 7 - Addendum to the Purchase and Sale Agreement.)

The Escrow Instructions also state:

In the event there is a variance between the terms of the Purchase and Sale Agreement and the final terms of the sale as evidenced by the documents delivered under these or other instructions, and the closing statements agreed to by the parties, closing shall be in accordance with such documents, instructions and closing statements. (Ex. 7)

All closing documents and instructions prepared by escrow officer Diane Hart indicated that the sole owner of the Olympia property was to be Culpepper,

including Closing/Recording Instructions prepared by Diane Hart that were sent to the First American office in Thurston County to issue a title insurance policy “showing title in James Brett Culpepper, an unmarried man as his sole and separate property.” Thus, there was **no** variance between the Purchase and Sale Agreement and Addendum thereto and the documents prepared by First American escrow officer Diane Hart. Without question, the Escrow Instructions and the Closing/Recording Instructions required First American to close the sale of the Olympia property to Culpepper as the sole owner.

The quit claim deed signed by Kathryn Ellis, however, conveyed the Trustee’s interest in the Olympia property not to James B. Culpepper as a single person, but to Culpepper and Mitsunaga as joint tenants. First American had a duty to disclose this discrepancy to Culpepper. *See Hurlbert v. Gordon*, 64 Wn. App. 386, 395, 824 P.2d 1238, *review denied*, 119 Wn.2d 1015, 833 P.2d 1389 (1992) (“an escrow agent has a duty to disclose all changes in the closing documents”). First American failed to do so, breaching its fiduciary duty to Culpepper.

Denaxas v. Sandstone Court of Bellevue, L.L.C., 148 Wn.2d 654, 63 P.3d 125 (2003) may be relied upon by First American to argue that “*Hurlbert* does not impose a duty on escrow agents to affirmatively identify differences between the closing documents and documents drafted by others.” *Id.* at 664, 63 P.3d 125. In *Denaxas*, however, the purchaser did not allege any deviation from the escrow instructions. *Denaxas* is thus distinguishable from this case, and

does not shield First American from liability.

First America's failure to notify Culpepper of the discrepancy between the quit claim deed and the closing documents and its breach of the Escrow Instructions directly resulted in Culpepper's involuntary payment of \$55,000 to Mitsunaga to have her cooperate with Culpepper in the sale of the Olympia property. An escrow agent or holder is liable to his principals for damage proximately resulting from his breach of the instructions. *Hurlbert*, 64 Wn. App. at 395, 824 P.2d 1238.

In arriving at its decision, the trial court, in finding of fact 16 found that Mitsunaga had contributed value to the Olympia property by doing work on the property, and in finding of fact 18 found that Culpepper did not provide sufficient evidence to quantify the work contributions of Mitsunaga, and therefore, in conclusion of law 3, concluded that Culpepper failed to establish its amount of damage against First American.

Culpepper submits that his damage was in fact the amount of \$55,000 which he was "forced" to pay Mitsunaga for her cooperation in selling the property in the year 2006. Had not First American breached its duty, Culpepper would have paid nothing to Mitsunaga in order to close the sale. The damage against First American is simply the amount Culpepper was required to pay without any deduction for work done by Mitsunaga.

B. THE AGREEMENT BY CULPEPPER TO PAY MITSUNAGA \$55,000 WAS NOT AN ACORD AND SATISFACTION.

During the period when Mitsunaga and Culpepper were together, Culpepper purchased the subject real property. Mitsunaga did not contribute any money to make the down payment (RP 67), she did not sign any loan documents (RP 72), and she did not make any mortgage, interest, or tax payments (RP 74-75). It is only due to First American's negligence and breach of escrow instructions that Mitsunaga's name appears on the deed.

Washington courts apply the "mortgage rule" to determine the character of real property. *In re Marriage of Chumbley*, 150 Wn.2d 1, 7, 74 P.3d 129 (2003). That rule states"

[W]here the buyer acquires legal title at the outset in exchange for a cash payment and an obligation to pay the remainder of the purchase price, the fractional share of the ownership represented by the cash payment will be owned as the cash was owned, and the character of ownership of the balance will be determined by the character of the credit pledged to secure the funds to pay the seller or to secure payment to the seller. It does not matter that funds of a different character are subsequently used to pay the obligation; the character of the asset is determined by the character of the cash and of the obligation at the time legal title (ownership) is obtained.

Chumbley, 150 Wn.2d at 7-8, 74 P.3d 129 (quoting Harry M. Cross, *The Community Property Law in Washington (Revised 1985)*, 61 Wash. LRev. 13, 40 (1986)).

In this case, Culpepper acquired legal title to the subject real property in exchange for a cash down payment and an obligation to pay the remainder of

the purchase price. Thus, the fractional share of the ownership represented by the down payment belongs to Culpepper, and the balance of the ownership belongs to Culpepper as well, because it was his credit alone that was pledged to secure the funds to pay the seller. Under *Chumbley*, the subject real property is entirely the separate property of Culpepper. Mitsunaga cannot claim any ownership right to the subject property.

In February of 2006, Culpepper took a new job in California. Because he moved, he was required to rent a home in California and because of the increased costs of paying for three properties, he decided to sell both of the properties he owned. He then discovered that Mitsunaga appeared as a co-owner on the deed. At the end of February 2006, Culpepper asked Mitsunaga to sign a quit claim deed so he could sell the property, and even told Mitsunaga that he would give her \$10,000 - \$12,000 for her help signing the sale agreement for the property when he sold it. (RP 131-132; 146) Culpepper subsequently received an offer to purchase the house for \$849,000. (Ex. 129) Mitsunaga refused to sign a quit claim deed unless she was paid \$55,000. To save the sale of the house, and for her cooperation in selling the property, Culpepper agreed to pay Mitsunaga \$55,000, and she signed the quit claim deed. Culpepper seeks restitution because Mitsunaga was unjustly enriched.

At trial, Mitsunaga asserted, and the trial court concluded, that Culpepper's payment to her in the amount of \$55,000 constituted an accord and satisfaction. Culpepper contends that the payment was not an accord and

satisfaction.

All elements of an accord and satisfaction “must be proved by the one asserting such an agreement.” *Gleason v. Metropolitan Mortgage Co.*, 15 Wn. App. 481, 497-498, 551 P.2d 147 (1976).

The elements of an accord do not exist in this case. “An accord is a contract **between debtor and creditor** to settle a **claim** by some performance other than that which is **due.**” *State Dept. of Fisheries v. J-Z Sales Corp.*, 25 Wn. App. 671, 676, 610 P.2d 390 (1980) (emphasis added). Culpepper was not a “debtor” to Mitsunaga for any amount, and Mitsunaga was not a “creditor” of Culpepper for any amount. There was no amount “due” from Culpepper to Mitsunaga at the time Mitsunaga demanded \$55,000.

Culpepper had previously voluntarily offered to pay Mitsunaga \$10,000 for her assistance in selling the Olympia house. (RP 146) This offer was not accepted and therefore, there was no contract between the parties for any amount. Mitsunaga may have had a potential claim for reimbursement for her efforts that increased the value of the house, but that claim had not been proven to a court. There was neither a “debt” nor an “obligation” running from Culpepper to Mitsunaga prior to payment of the \$55,000. There was no “accord.”

“Satisfaction occurs when the accord is performed.” *Id.*, citing *Plywood Marketing Assoc. v. Astoria Plywood Corp.*, 16 Wn.App. 566, 574, 558 P.2d 283 (1976). Because there was no “accord,” payment of the \$55,000 to Mitsunaga was not a “satisfaction.”

Generally, whether there has been an accord and satisfaction is a mixed question of law and fact, “[b]ut where, as here, there are no facts in controversy, it is purely a question of law.” *U.S. Bank Nat. Ass’n v. Whitney*, 119 Wn.App. 339, 350, 81 P.3d 135 (2003). The court should rule that there was no accord and satisfaction in this case as a matter of law.

C. MITSUNAGA WAS UNJUSTLY ENRICHED.

Because of his financial situation of support two houses and paying rent for a third, Culpepper really had no choice about paying Mitsunaga the \$55,000: if he did not pay her he most probably would have lost the offer on the Olympia house. Thus, his payment of \$55,000 to her was not made voluntarily. The fact that Culpepper did, in fact, make the payment does not *ipso facto* render it “voluntary.” In *Clark v. Luepke*, 60 Wn. App. 858, 809 P.2d 752 (1991), Clark took his Jeep to Luepke, who owned and operated a car repair shop. Luepke could not estimate the repair cost without tearing down the engine, but Clark nevertheless gave oral authorization to proceed with the repairs. Luepke completed the work, and the bill came to \$2,764. Clark could not pay that amount, so Luepke refused to release the vehicle. After about six weeks, Clark paid the bill and Luepke released the Jeep. Clark subsequently brought suit against Luepke, claiming he was entitled to restitution because Luepke had failed to comply with the Automotive Repair Act, which requires a written estimate of



the cost of repairs in advance of work being performed. That Clark had paid Luepke was not in dispute. As to whether Clark's payment was "voluntary," the Court wrote:

Because Luepke was in violation of the ARA, he had no right to claim a possessory lien against Clark's vehicle. RCW 46.71.050. Nevertheless, he did so, and Clark had to pay his bill in order to secure the vehicle's return. On these facts, Clark's payment was involuntary. *Clark*, 60 Wn. App. at 852, fn 6, 809 P.2d 752.

The pertinent legal circumstances here are the same as those in *Clark*. Mitsunaga had no legal right to payment of \$55,000 from Culpepper. Nevertheless, she demanded it and Culpepper had to pay her this amount in order to sell his house. Here, as in *Clark*, Culpepper's payment to Mitsunaga was "involuntary." "A payor may maintain an action to recover money paid involuntarily due to coercion, duress or compulsion, (citations omitted) if retention of the money would unjustly enrich the payee." *Clark*, 60 Wn. App. at 851, 809 P.2d 752 (citing *Pacific Coal & Lbr. Co. v. Pierce Cy.*, 133 Wash. 278, 281, 233 P. 953 (1925)).

The elements of an action for restitution are "(1) that payment was made, (2) that it was made involuntarily, and (3) that the payee would be unjustly enriched if allowed to retain the payment." *Id.* (citing *Wendell's, Inc. v. Malmkar*, 225 Neb. 341, 405 N.W.2d 562, 568 (1987); *Estate of McCallum*, 153 Mich.App. 328, 395 N.W.2d 258, 261 (1986)). "Under common law principles, the payor has the burden of proving each of these elements by a preponderance of the evidence." *Id.* "Ordinarily . . . the third element will be proved by showing

that the payee was not legally entitled to receive payment in the first instance.”

Id. at 852, 809 P.2d 752.

It is not disputed that payment was made. The first element of a restitution action is satisfied. Culpepper’s payment of \$55,000 to Mitsunaga was involuntary under *Clark*. The second element of a restitution action is satisfied. Finally, Mitsunaga was not legally entitled to receive payment from Culpepper in the first instance. She was therefore unjustly enriched by the payment. Culpepper is entitled to restitution.

CONCLUSION

The Court of Appeals should reverse the trial court’s judgments and remand to the trial court with instructions to enter judgment in favor of Culpepper against both Mitsunaga and First American in the amount \$55,000 plus prejudgment interest.

Respectfully submitted this 22nd day of June, 2010.

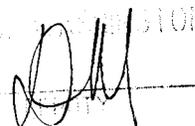


John P. O’Connor, WSBA No. 6806
Attorney for Petitioner

FILED
COURT OF APPEALS

10 JUN 22 AM 10:17

STATE OF WASHINGTON

BY 

**IN THE COURT OF APPEALS, DIVISION II
COUNTY OF PIERCE, STATE OF WASHINGTON**

JAMES BRETT CULPEPPER,
Plaintiff,
vs
FIRST AMERICAN TITLE INSURANCE
COMPANY, and HOLLIS MITSUNAGA, a
single individual,
Defendants.

APPEAL NO. 40219-0-II

CERTIFICATE OF SERVICE

Pursuant to the laws of the State of Washington, the undersigned certifies under penalty of perjury that a true and correct copy of the **BRIEF OF APPELLEE, and this certificate of service** were on this date, sent out for service to the following:

via ABC Legal Messenger Service:

Jack W. Hanemann, Jr.
2120 State Ave NE STE 101
Olympia, Washington 98506-6515

via Regular US Mail:

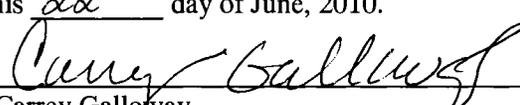
James K. Sells
9657 Levin Road NW, Suite 240
Silverdale, Washington 98383

via Facsimile Transmission:

James K. Sells
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Jack W. Hanemann, Jr.
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Signed at Tacoma, Washington this 22nd day of June, 2010.



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