

NO. 47657-6-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

SARAH JOHNSON, as Personal Representative of the ESTATE OF
PHILLIP CUNNINGHAM,

Appellant,

v.

CITY OF TACOMA, a municipality,

Respondent/Cross-appellant.

RESPONDENT'S BRIEF

ELIZABETH A. PAULI, City Attorney

MARGARET A. ELOFSON
WSB# 23038
Attorney for Respondent/Cross-Appellant

Tacoma City Attorney's Office
747 Market Street, Suite 1120
Tacoma, Washington 98402
(253) 591-5885

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ISSUES ON APPEAL	2
	1. Whether the trial court correctly dismissed plaintiff’s claim for negligent misrepresentation when the plaintiff has no evidence that a false representation was made, no evidence that the City was negligent in communicating false information, no evidence of reliance on a false representation, and no evidence that Mr. Cunningham suffered any damages as a result of a false representation.	
	2. Whether the trial court correctly dismissed plaintiff’s claim for intentional misrepresentation when the plaintiff has no evidence that a false representation was made, no evidence that the City intended to convey false information, no evidence of reliance on a false representation, and no evidence that Mr. Cunningham suffered any damages.	
	3. Whether the trial court correctly dismissed plaintiff’s breach of contract claim where there is no evidence that Mr. Cunningham intended to choose a different retirement option than the one he did select on his signed retirement application, and where the City paid benefits according to that selection.	
	4. Whether the trial court correctly dismissed the plaintiff’s claim for unjust enrichment given that unjust enrichment is not applicable where an actual contract exists.	
	5. Whether the trial court erred in excluding the testimony of City witnesses when those witnesses are not interested parties for purposes of the deadman’s statute.	
	6. Whether the trial court erred in excluding the testimony of City witnesses when the plaintiff waived the deadman’s statute by pleading causes of action that necessarily require the testimony	

of City witnesses about their conversations with Mr. Cunningham during the retirement process.

III. STATEMENT OF THE CASE	3
A. Factual History.....	3
B. Procedural History	8
IV. STANDARD OF REVIEW.....	9
V. ARGUMENT.....	12
A. <u>Plaintiff’s claim for negligent misrepresentation fails as a matter of law because plaintiff does not have evidence of the essential elements of the claim</u>	12
B. <u>Plaintiff’s claim for intentional misrepresentation fails as a matter of law because plaintiff does not have evidence of the essential elements of the claim</u>	17
C. <u>Plaintiff’s breach of contract claim fails as a matter of law because it is undisputed that the City paid benefits according to the terms of the contract and there is no evidence that Mr. Cunningham intended to receive retirement benefits under any plan other than the one he selected.</u>	18
D. <u>The plaintiff’s claim for unjust enrichment fails as a matter of law because there is an actual contract that governs the benefits paid</u>	23
E. <u>The plaintiff’s claim for unjust enrichment fails as a matter of law because there is an actual contract that governs the benefits paid</u>	25
F. <u>The deadman’s statute does not apply because City witnesses are not interested parties under Washington law</u>	29
G. <u>The deadman’s statute has been waived by plaintiff because plaintiff relies on the same statements of City witnesses that she seeks to prevent the defendant from introducing</u>	32

VI. CONCLUSION34

TABLE OF AUTHORITIES

CASES:

<u>Baddeley v. Seek</u> , 138 Wn. App. 333, 156 P.3d 959 (2007)	17
<u>Baertschi v. Jordan</u> , 68 Wn.2d 478, 413 P.2d 657 (1966)	17
<u>Bailie Commc'ns Ltd v. Trend Bus. Sys., Inc.</u> , 61 Wn. App. 151, 810 P.2d 12 (1991)	24
<u>Bakenhus v. City of Seattle</u> , 48 Wn.2d 695, 296 P.2d 536 (1956).....	18, 25
<u>Bentzen v. Demmons</u> , 68 Wn. App. 339, 842 P.2d 1015 (1993)	30, 34
<u>Berg v. Hudesman</u> , 115 Wn.2d 657, 801 P.2d 222 (1990).....	23
<u>Borish v. Russell</u> , 155 Wn. App. 892, 230 P.3d 646 (2010)	13
<u>Celotex Corp. v. Catrett</u> , 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).....	10
<u>Commisioner v. Keystone Consol. Industries, Inc.</u> , 508 U.S. 152, 154, 124 L. Ed. 2ed. 71, 113 S. Ct. 2006 (1993)	27
<u>Condor Enterprises, Inc. v. Boise Cascade Corp.</u> , 71 Wn.App. 48, 856 P.2d 713 (1993)	12, 13
<u>Ellis v. City of Seattle</u> , 142 Wn.2d 450, 458, 13 P.3d 1065 (2000).	9
<u>Erickson v. Kerr</u> , 125 Wn.2d 183, 187-88, 883 P.2d 313 (1994).....	30, 33
<u>Folsom v. Burger King</u> , 135 Wn.2d 658, 663, 958 P.2d 301 (1998).....	9
<u>Grimwood v. Univ. of Puget Sound</u> , 110 Wn.2d 355, 753 P.2d 517 (1988)	15, 16
<u>Hash v. Children's Orthopedic Hosp. & Med. Ctr.</u> , 110 Wn.2d 912, 916, 757 P.2d 507 (1988)	10

<u>Herron v. Tribune Publishing Co.</u> , 108 Wn.2d 162, 170, 736 P.2d 249 (1987).....	11
<u>Hiatt v. Walker Chevrolet</u> , 120 Wn.2d 57, 66, 837 P.2d 618 (1992)	11
<u>Howell v. Spokane & Inland Empire Blood Bank</u> , 117 Wn.2d 619, 624, 818 P.2d 1056 (1991)	10
<u>Hughes Aircraft Co. v. Jacobson</u> , 525 U.S. 432, 439, 119 S. Ct. 755, 142	27, 29, 31
<u>Int’l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.</u> , 122 Wn. App. 736, 744, 87 P.3d 774, <u>review denied</u> , 153 Wn.2d 1016 (2004).	16
<u>Jacoby v. Gray Harbor Chair & Mfg.</u> , 77 Wn.2d 911, 917, 468 P.2d 666 (1970))	19, 25, 26
<u>Johnson v. Medina Imp. Club, Inc.</u> , 10 Wn.2d 44, 59-60, 116 P.2d 272 (1941)	34
<u>Lynott v. National Union Fire Ins. Co.</u> , 123 Wn.2d 678, 6894, 871 P.2d 146 (1994)	23
<u>Marincovich v. Tarabochia</u> , 114 Wn.2d 271, 274, 787 P.2d 562 (1990)	10
<u>Parks v. Fink</u> , 173 Wn. App. 366, 375, 293 P.3d 1275 (2013)	9, 32
<u>Poulsbo Group, LLC v. Talon Dev. LLC</u> , 155 Wn. App. 339, 229 P.3d 906 (2010)	17
<u>Retired Pub. Emps. Council of Wash. v. Charles</u> , 148 Wn.2d 602, 62 P.3d 470 (2002).....	26
<u>Rice v. Life Ins. Co.</u> , 25 Wn. App. 479, 609 P.2d 1387 (1980)	31, 32
<u>Seiber v. Poulsbo Marine Center, Inc.</u> , 136 Wn. App. 731, 736, 150 P.3d 633 (2007).	11
<u>Top Line Builders, Inc. v. Bovenkamp</u> , 170 Wn. App. 794, 320 P.3d 130 (2014)	24

<u>Top Line Builders, Inc. v. Bovenkamp</u> , 179 Wn. App. 794, 806, 320 P.3d 130 (2014)	24
<u>Trimble v. Washington State Univ.</u> , 140 Wn.2d 88, 92-93, 993 P.2d 259 .9 (2000)).	
<u>Wash. Fed’n of State Employees v. State</u> , 107 Wn. App. 241, 26 P.3d 1003 (2001)	
<u>West Coast Inc., v. Snohomish County</u> , 112 Wn. App. 200, 48 P.3d 997 (2002)	17
<u>Wildman v. Taylor</u> , 46 Wn. App. 546, 549, 731 P.2d 541 (1987)	30
<u>Wong v. Boeing Co.</u> , 26 Wn. App. 557, 613 P.2d 788 (1980)	19, 25, 26
<u>Young v. Key Pharmaceuticals, Inc.</u> , 112 Wn.2d 216, 770 P.2d 182 (1989)	10
<u>Young v. Young</u> , 164 Wn.2d 477, 485-86, 191 P.3d 1258 (2008)	24
<u>Zvolis v. Condos</u> , 56 Wn.2d 275,352 P.2d 809 (1960)	33
STATUTES:	
RCW 5.60.030	8, 30
CIVIL RULES:	
CR 56	10
OTHER AUTHORITIES:	
5A Karl B. Tegland, EVIDENCE:WASH. PRAC. §601.17	30

I. INTRODUCTION

Plaintiff's father retired from the City of Tacoma in January 2013. He was single and had no dependents. The month before his retirement, he reviewed the retirement options available under the Tacoma Employees' Retirement System (TERS), and selected the option that provided the maximum monthly payment for the rest of his life but did not provide any after-death benefits to a spouse or other beneficiary. Mr. Cunningham began receiving his retirement benefits according to the plan he selected. Then, in February 2013, Mr. Cunningham took his own life, which necessarily curtailed any further retirement benefits under the plan he had selected.

Plaintiff argues that Mr. Cunningham must have been confused because she does not believe her father would have selected a retirement plan that did not provide benefits to her. Plaintiff initiated the current lawsuit, seeking to overturn her father's selection. Plaintiff's claims were dismissed at summary judgment.

Plaintiff appeals the dismissal of her claims. Defendant cross-appeals the superior court's ruling to exclude the conversations that City of Tacoma Retirement Department employees had with Mr. Cunningham during the process of completing the retirement application forms.

II. ISSUES ON APPEAL

1. Whether the trial court correctly dismissed plaintiff's negligent misrepresentation claim when plaintiff failed to produce any evidence that a false representation was made to Mr. Cunningham and failed to produce any evidence that Mr. Cunningham relied to his detriment on a false representation.
2. Whether the trial court correctly dismissed plaintiff's intentional misrepresentation claim when plaintiff failed to produce any evidence that a false representation was made to Mr. Cunningham and failed to produce any evidence that Mr. Cunningham relied to his detriment on a false representation.
3. Whether the trial court correctly dismissed plaintiff's breach of contract claim when the City paid retirement benefits to Mr. Cunningham in compliance with the terms of the retirement plan selected by Mr. Cunningham.
4. Whether the trial court correctly dismissed plaintiff's unjust enrichment claim when it is well-established that retirement plans are part of the employment contract and unjust enrichment is available only in cases where there is no contract.
5. Whether the trial court correctly dismissed plaintiff's unjust enrichment claim when it is well-established that no individual retiree has any claim to the assets of a defined benefit plan fund so that the fund's retention of Mr. Cunningham's contributions cannot be considered unjust.
6. Whether the trial court erred in excluding the statements of City of Tacoma employees when those employees are not "interested parties" for the purposes of the Deadman's Statute, and when the plaintiff waived the Statute by asserting those same conversations in support of her claims.

III. STATEMENT OF THE CASE

A. Factual History

Plaintiff's father, Phillip Cunningham, retired from his job as a City of Tacoma Water Control Station Operator on January 1, 2013. Mr. Cunningham had started working with the City in June, 1989. The City of Tacoma has a mandatory retirement program called Tacoma Employees Retirement System, or TERS. Thus, during his employment with the City, Mr. Cunningham, like all City employees, contributed a percentage of his wages to TERS. CP 57.

On November 27, 2012, Mr. Cunningham visited the TERS office and asked for information about his retirement benefits. CP 66. He told the TERS staff that he was thinking about retiring and he filled out a Retirement Estimate Request. There are eight different retirement options available to TERS retirees. CP 47-48, CP 77. Mr. Cunningham did not list a spouse and did not list the name or birthdate of an intended beneficiary on the Retirement Estimate Request, making only five of the retirement options applicable. CP 36, 77. Mr. Cunningham's benefits were calculated under those five options by a TERS accountant. CP 38-40. Mr. Cunningham could have asked for an estimate of benefits for the retirement option that provided benefits for a specific beneficiary after his death, such as his daughter, but he did not do so. CP 36.

Mr. Cunningham came back to the TERS office and picked up the benefits estimate on November 28, 2012. CP 38-40, 67. The estimate listed the benefits available under the five options along with an explanation of each option. CP 38-40. The cover letter that accompanied the retirement estimate directed Mr. Cunningham to the Tacoma Employees' Retirement Plan Handbook for additional information about the retirement options. CP 42-45, 73-75. The online information also explained the various options available to retirees. Id.

When Mr. Cunningham picked up his estimate on November 27, 2012, he made an appointment to return to the TERS office on December 3, 2012, to meet with a Benefits Specialist to complete the retirement forms. CP 66-68. On December 3, 2012, Mr. Cunningham arrived at the TERS office for his retirement conference with Benefits Specialist, Marni Moore. While he waited for Ms. Moore to meet with him, Mr. Cunningham chatted with Cecelia Moullet, the TERS Office Assistant, who sits at the front desk and greets people as they enter the TERS office. Id. Mr. Cunningham told Ms. Moullet that the retirement option he had selected was the Unmodified Option. Ms. Moullet asked Mr. Cunningham if he was sure that he wanted to do that because that option does not provide anything to beneficiaries in the case of the retiree's death. Id. Mr. Cunningham responded that he was aware of that aspect of the

Unmodified Option and that he did not want to leave anything to any beneficiaries. Id.

Ms. Moore then met with Mr. Cunningham. They spent 90 minutes going over the retirement forms and completing all the necessary paperwork. CP 66. One of the forms completed during the conference was the Counseling Checklist, which lists 18 topics that are covered during the conference. As each topic was explained and discussed, Ms. Moore initialed the topic as having been completed. Id. When all the topics had been covered, both Mr. Cunningham and Ms. Moore signed the checklist. Id.

One of the first topics covered during the conference was the selection of a retirement option. Ms. Moore asked Mr. Cunningham if he had decided which option he wanted. CP 66. Mr. Cunningham stated that he had decided on the Unmodified Option. Id. Ms. Moore then told Mr. Cunningham that under that option, no beneficiaries would receive anything upon Mr. Cunningham's death. Ms. Moore explained that under the Unmodified Option, if Mr. Cunningham were to die tomorrow no one would receive anything. Id. Ms. Moore recalls asking Mr. Cunningham whether he was sure that there was no one that he wanted to designate as a beneficiary and for whom he wanted to provide benefits after his death. Ms. Moore recalls that Mr. Cunningham responded that he did not want

anyone to “get a dime.” CP 66. Ms. Moore then checked the box next to the Unmodified Option. Ms. Moore then proceeded to write the word “Estate” in the next box on the form. Id. As she did so, she explained to Mr. Cunningham that a pro-rata payment for the days left in the month of his death would be deposited in his bank account. Id. The final retirement payment must be paid so the City deposits it in the retiree’s account for the retiree’s estate to handle if no beneficiary has been named. Ms. Moore then discussed the remaining 15 topics listed on the Counseling Checklist. Mr. Cunningham signed the checklist and signed his retirement application and left the office. Id.

There was nothing unusual about Mr. Cunningham’s choice of the Unmodified Option. Approximately 20% of City of Tacoma retirees choose this option. CP 88. This option pays the highest monthly benefit but does not provide for continuing benefits to anyone after the retiree’s death. See., e.g., CP 74.

City of Tacoma TERS employees do not attempt to guide or direct any retirees into a particular option; they are not financial counselors. CP 88-89. Rather, their job is to inform prospective retirees about the options available and to make sure that they understand what the various options provide. Id. It is up to each employee to determine which option best suits his or her own needs. Id.

Mr. Cunningham died on February 10, 2013. The cause of death was suicide. Plaintiff Sarah Johnson is Mr. Cunningham's only child. She was 31 years old, married, and not financially dependent on her father at the time of her father's death. Ms. Johnson states that prior to his death, Mr. Cunningham had told her that "everything would go to [her]" although Mr. Cunningham never identified what "everything" encompassed. CP 80, 85. For example, Mr. Cunningham never mentioned his retirement account to Ms. Johnson and never mentioned any other specific account or investment. CP 80-81. After his death, Mr. Cunningham's entire estate did go to Ms. Johnson via a will Mr. Cunningham had prepared in 1983, the year that Ms. Johnson was born and six years before Mr. Cunningham started working for the City. CP 86.

After her father died and she learned of her father's retirement account selection, Ms. Johnson decided that her father must have misunderstood the retirement documents or that he must have been misled in making his retirement selection because she does not believe that he would have selected an option that did not provide money for her. CP 83-84. However, Ms. Johnson admits that she does not know what was said to her father when he filled out his retirement documents (CP 81); her father never showed her any documents related to his retirement (CP 80); she never talked with her father about a retirement account (CP 81); he

never told her what the options were for his retirement account or what option he selected (CP 82); he never told her that she was the beneficiary of any retirement account (CP 85); and she is not aware of any facts from which it can be inferred that her father intended to make any retirement election other than the one he did. (CP 83).

The only evidence Ms. Johnson has to support her claims against the City is that Marni Moore wrote the word “Estate” on the Retirement Application to indicate where the final pro-rated payment would go. Ms. Johnson thinks that could have been confusing to her father and that perhaps her father thought he was leaving his retirement to her despite his having chosen an option that did not provide for beneficiaries after his death. CP 79.

B. Procedural History

Plaintiff initiated the instant action, asserting causes of action for breach of contract, unjust enrichment, negligent misrepresentation, intentional misrepresentation, and declaratory judgment. Following discovery, the City moved for summary judgment on all of the plaintiff’s claims. In her response to summary judgment, plaintiff included a motion to strike the testimony of City employees, arguing that such testimony was precluded by RCW 5.60.030, commonly referred to as the Deadman’s Statute. CP 94-95.

The trial court granted the defendant's motion, dismissing all of the plaintiff's claims. As to the plaintiff's motion to strike the testimony of City witnesses on the basis of the Deadman's Statute, the trial court granted the motion. Plaintiff appeals the trial court's ruling on summary judgment, and the City cross-appeals the court's ruling as to the Deadman's Statute.¹

IV. STANDARD OF REVIEW

Appellate review of summary judgment determinations is *de novo*. Ellis v. City of Seattle, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). Thus, "the appellate court engages in the same inquiry as the trial court." Id. (quoting Trimble v. Washington State Univ., 140 Wn.2d 88, 92-93, 993 P.2d 259 (2000)). Appellate review of evidentiary rulings at summary judgment, such as the trial court's ruling on the admissibility of City employees' conversations with Mr. Cunningham, is also *de novo*. Parks v. Fink, 173 Wn. App. 366, 375, 293 P.3d 1275 (2013) (citing Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)).

Pursuant to CR 56 (c), summary judgment should be granted if

¹ The plaintiff's motion to strike the testimony of City witnesses was included in the plaintiff's response to summary judgment. CP 94-95. The motion sought the exclusion of all City witnesses. However, the Court's order states only that the testimony of Ms. Moore is stricken. CP 131-32. In her brief, plaintiff also refers only to the testimony of Ms. Moore. Brief at 4 (stating that the court struck the "declaration of Ms. Moore."). However, the City will argue the issue of the Deadman Statute as applied to all City witnesses because both the plaintiff and the City agree that there is no relevant difference between any City employees on this issue.

there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. One of the principal purposes of the rule is to dispose of factually and legally unsupported claims or defenses. CR 56; Marincovich v. Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990); Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

On a motion for summary judgment, the moving party bears the initial burden of showing the absence of a material issue of fact. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A defendant can meet this burden in one of two ways. First, the defendant can set forth its version of the facts and allege that there is no material issue as to those facts. Hash v. Children's Orthopedic Hosp. & Med. Ctr., 110 Wn.2d 912, 916, 757 P.2d 507 (1988). In the alternative, the defendant can meet its burden by showing that there is absence of evidence to support the nonmoving party's case. Howell v. Spokane & Inland Empire Blood Bank, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986)). After the defendant makes its required showing, the burden then shifts to the plaintiff:

If, at this point, the plaintiff [as nonmoving party]
“fails to make a showing sufficient to establish the
existence of an element essential to that party's

case, and on which that party will bear the burden of proof at trial”, then the trial court should grant the motion....”In such a situation, there can be ‘no genuine issue as to any material fact,’ since **a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.**”

Hiatt v. Walker Chevrolet, 120 Wn.2d 57, 66, 837 P.2d 618 (1992)

(emphasis added). Consequently, the plaintiff “must do more than express an opinion or make conclusory statements;” the plaintiff must set forth specific and material facts to support each element of his prima facie case.

Id.

Finally, while “[t]he nonmoving party is entitled to have the evidence viewed in a light most favorable to him,” the standard on summary judgment does not relieve the nonmoving party of his burden to adduce competent, admissible evidence sufficient to support a jury’s verdict. Seiber v. Poulsbo Marine Center, Inc., 136 Wn. App. 731, 736, 150 P.3d 633 (2007). “[I]f the plaintiff, as the nonmoving party, can offer only a “scintilla” of evidence, evidence that is “merely colorable,” or evidence that “is not significantly probative,” the plaintiff will not defeat the motion.” Id. (citing Herron v. Tribune Publishing Co., 108 Wn.2d 162, 170, 736 P.2d 249 (1987)) (emphasis added).

V. ARGUMENT

- A. **The trial court correctly dismissed plaintiff's claim of negligent misrepresentation because plaintiff had no evidence to support the essential elements of the claim, and thus could not demonstrate a genuine issue of material fact.**

Ms. Johnson alleges that the City “made false representations as to the ability to designate a beneficiary on the employee retirement form” and that Mr. Cunningham relied on the false representations. CP 4. The trial court correctly ruled that plaintiff failed to provide evidence to support that claim. VRP 9: 24-25.

In order to prove a claim of negligent misrepresentation, the plaintiff must prove by clear, cogent, and convincing evidence that (1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages. Condor Enters., Inc. v. Boise Cascade Corp., 71 Wn. App. 48, 52, 856 P.2d 713 (1993) (confirming that Washington cases follow the Restatement with respect to the six elements of negligent misrepresentation). “The crux of a negligent

misrepresentation claim is the conveying of and reliance on false information.” Borish v. Russell, 155 Wn. App. 892, 905, 230 P.3d 646 (2010), review denied 170 Wn.2d 1024 (2011). See also, Condor, 71 Wn. App. at 52.

In this case, there is no evidence that the City conveyed any false information to Mr. Cunningham. On the contrary, all of the evidence is that the City gave accurate information to Mr. Cunningham. Both Marni Moore and Cecelia Moullet explained to Mr. Cunningham that the Unmodified Option did not provide for benefits to anyone after the employee’s death, and Mr. Cunningham confirmed that that was the option he wanted. CP 66-71.

Nor is there any evidence that the information supplied to Mr. Cunningham in paper form or in online documents contained any false statements. His Retirement Estimate explained the options available to him and showed how much he would receive depending on which option he chose. Regarding the Unmodified Option, it stated:

The Unmodified Benefit will pay you approximately \$2,834.45 per month for your life. No benefit will be paid to a beneficiary after your death.

CP 38-40. When Mr. Cunningham met with Benefits Specialist Marni Moore to go over his retirement forms, Mr. Cunningham stated that he desired the Unmodified Option. There is no dispute that that selection was

marked on the Application for Service Retirement Form signed by Mr. Cunningham.

Not only did his retirement estimate and retirement application clearly state that the unmodified option did not provide after-death benefits, the terms of the Unmodified Option were accurately described in the various handbooks and presentations provided to City employees. For example, the TERS Handbook described the Unmodified Option this way: “The maximum allowance you can receive is the unmodified monthly form of payment. This option is for the member only, and does not provide for a spouse or beneficiary.” CP 73-75. The TERS Overview on the City’s website contains a diagram showing that the Unmodified Option pays “Nothing” to a beneficiary or survivor. CP 77. The terms of the pension contract are clearly and accurately spelled out in all City communications. There is no evidence to suggest that City made any false representations to Mr. Cunningham; all of the evidence demonstrates that the City accurately and truthfully informed Mr. Cunningham regarding his retirement options and benefits.

Similarly, there is no evidence of any reliance on any false information. The plaintiff has acknowledged that she has no information concerning what was said to Mr. Cunningham during his 90 minute retirement conference and she never spoke to her father about his

retirement account. In addition, the evidence is that when Mr. Cunningham arrived at his appointment with Ms. Moore, Mr. Cunningham had already made up his mind concerning what type of retirement payments he wanted and he did not rely on Ms. Moore's explanations in making his selection. CP 66-71, CP 87-89.

Nor is there any evidence that he suffered a detriment because of any reliance on any information. Mr. Cunningham selected the Unmodified Option and his benefits were paid according to the terms of that option. While Ms. Johnson is unhappy with her father's choice, there is no evidence that Mr. Cunningham was unhappy with his choice or that he believed that he had suffered a detriment.

Because the City established that the plaintiff has no evidence to support the essential elements of negligent misrepresentation, the burden shifted to the plaintiff to come forward with specific, credible facts showing that there is a genuine issue for trial. CR 56(e). In this case, the plaintiff failed to do so. The most the plaintiff was able to do at summary judgment, and also on appeal, was to suggest that perhaps the trial judge will make a credibility determination during the bench trial that Ms. Moore or Ms. Moulett supplied false information. This is insufficient as a matter of law. "The 'facts' required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature." Grimwood, 110 Wn.2d at

360. “The non-moving party may not rely on speculation, mere allegations, denials, or conclusory statements to establish a genuine issue of material fact.” Int’l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 744, 87 P.3d 774, review denied, 153 Wn.2d 1016 (2004). And, a party’s own self-serving opinions and conclusions are insufficient to defeat a motion for summary judgment. Grimwood, at 359-61. “A fact is an event, an occurrence, or something that exists in reality.” Grimwood v. Univ. of Puget Sound, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988) (citing Webster’s Third New Int’l Dictionary 813 (1976)). Such facts are completely lacking in plaintiff’s arguments.

Plaintiff continually argues there are material questions of fact but plaintiff mistakenly equates a complete lack of evidence regarding a particular fact with a question of fact created by competing evidence. A complete lack of evidence may create a theoretical question upon which one can speculate, but it does not create a question of fact to be resolved by the trier-of-fact based on actual, admissible evidence. Because plaintiff has no evidence on the essential elements of her negligent misrepresentation claim, the trial court properly dismissed the claim on summary judgment.

B. The trial court properly dismissed plaintiff's claim for fraud/intentional misrepresentation because plaintiff lacks evidence on the essential elements of the claim.

The same analysis applies to the plaintiff's claim for fraudulent misrepresentation because plaintiff lacks factual evidence to support the essential elements of the claim. A claim of fraud/intentional misrepresentation requires the plaintiff to establish nine elements by clear, cogent, and convincing evidence. Baddeley v. Seek, 138 Wn. App. 333,338-39, 156 P.3d 959 (2007).² The elements are: (1) a representation of an existing fact, (2) the fact is material, (3) the fact is false, (4) the defendant knew the fact was false or was ignorant of its truth, (5) the defendant intended the plaintiff to act on the fact, (6) the plaintiff did not know the fact was false, (7) the plaintiff relied on the truth of the fact, (8) the plaintiff had a right to rely on it, and (9) the plaintiff had damages. Baddeley, at 338-39, (citing Baertschi v. Jordan, 68 Wn.2d 478, 482, 413 P.2d 657 (1966)).

As stated above, the plaintiff has no knowledge of what was said to Mr. Cunningham during his retirement conference and she cannot point to

² Fraud and intentional misrepresentation are interchangeable because the elements are identical. Poulsbo Group, LLC v. Talon Dev., LLC, 155 Wn. App. 339, 345-46, 229 P.3d 906 (2010) ("In order to prevail on a claim for intentional misrepresentation, [the plaintiff] must show '(1) representation of an existing fact, (2) materiality, (3) falsity, (4) the speaker's knowledge of its falsity, (5) intent of the speaker that it should be acted upon by the plaintiff, (6) plaintiff's ignorance of its falsity, (7) plaintiff's reliance on the truth of the representation, (8) plaintiff's right to rely upon the representation, and (9) damages suffered by the plaintiff.'" (quoting W. Coast, Inc. v. Snohomish County, 112 Wn. App. 200, 206, 48 P.3d 997 (2002)).

any documents that relayed false facts to Mr. Cunningham. Thus, she has no evidence that any false facts were relayed (element 3), no evidence that the City knew the facts were false (element 4), no evidence that the City intended Mr. Cunningham to act on the false fact (element 5), no evidence that Mr. Cunningham actually relied on the false fact (elements 6 and 7) or that Mr. Cunningham suffered damages as a result (element 9). A complete lack of evidence on any one of these elements requires dismissal. Young, 112 Wn.2d at 225. The court properly dismissed the plaintiff's claim of fraudulent misrepresentation.

C. The trial court correctly dismissed plaintiff's breach of contract claim because all of the evidence demonstrates that the City paid Mr. Cunningham his benefits according to the retirement option he selected.

Plaintiff also claims the City breached its contract with Mr. Cunningham. However, there is no evidence of a breach. All of the evidence is that Mr. Cunningham received the benefits of the pension option he selected.

Under Washington law, a retirement fund or pension plan to which employees make compulsory nonrefundable deductions from their salaries is a contract and regular rules regarding contract interpretation apply.

Bakenhus v. City of Seattle, 48 Wn.2d 695, 696, 296 P.2d 536 (1956).

“The employee who accepts a job to which a pension plan is applicable

contracts for the pension and is entitled to receive its benefits when he has fulfilled the prescribed conditions.” Wong v. Boeing Co., 26 Wn. App. 557, 561, 613 P.2d 788 (1980). “The contractual rights and obligations of the parties under a pension plan are to be measured by the terms of the contract and where the terms of the pension contract, taken as a whole, are plain and unambiguous, the meaning of the contract is to be deduced from its language alone.” Id., citing Jacoby v. Gray Harbor Chair & Mfg., 77 Wn.2d 911, 916, 917, 468 P.2d 666 (1970).

In this case, the terms of Mr. Cunningham’s pension are plain and unambiguous. His Retirement Estimate explained how much he would receive depending on which option he chose. The terms of the Unmodified Option were stated as follows:

The Unmodified Benefit will pay you approximately \$2,834.45 per month for your life. No benefit will be paid to a beneficiary after your death.

CP 38-40. After receiving the Estimate, Mr. Cunningham met with Benefits Specialist, Marni Moore. Mr. Cunningham told Ms. Moore that he desired the Unmodified Option. That selection was indicated on the Application for Service Retirement Form, which Mr. Cunningham signed.

CP 47-48. Above Mr. Cunningham’s signature line is the statement:

The decision to retire is mine alone, voluntary, and of my own free will. I affirm that I made this decision after

receiving the foregoing information including a printout of my retirement options benefits estimate.

Id. In addition, the terms of the Unmodified Option are described in the various handbooks and presentations provided to City employees. For example, the TERS Handbook described the Unmodified Option this way: “The maximum allowance you can receive is the unmodified monthly form of payment. This option is for the member only, and does not provide for a spouse or beneficiary.” CP 73-75. The TERS Overview on the City’s website contains a diagram showing that the Unmodified Option pays “Nothing” to any beneficiary or survivor. CP 77. The terms of the pension contract are clearly spelled out in all City communications. Thus, the terms of the pension contract were clear and unambiguous, and the City complied with those terms.

In her complaint, the plaintiff alleges that the City “failed to honor Mr. Cunningham’s beneficiary designation as his Estate.” CP 3. However, Mr. Cunningham did not choose a retirement plan that provided for post-death benefits and he never designated his estate as his beneficiary. Plaintiff claims that the Retirement Form was rendered ambiguous when the City Benefits Specialist, Marni Moore, wrote the word “Estate” on the form during the retirement conference. Ms. Moore has testified that she wrote the word “Estate” on the Retirement Form after

having confirmed with Mr. Cunningham that he understood that the Unmodified Option he selected did not provide any after-death benefits and after telling Mr. Cunningham that the word “Estate” denoted where the final pro-rata payment of his pension would be paid upon his death. CP 88-89.

In arguing that the contract terms were ambiguous, plaintiff makes a number of assertions that are factually inaccurate. For example, plaintiff states that Mr. Cunningham listed “Estate” as a beneficiary designation on his Application for Retirement. Appellant’s Brief at 3. That is inaccurate. No beneficiary was listed. Instead, in the space where a beneficiary’s name should be placed if a beneficiary was intended, Marni Moore wrote the word “Estate,” telling Mr. Cunningham that although the plan he chose did not have after-death benefits, in the month of his death the City would need to pay the final pro-rata payment due under his retirement plan.

Plaintiff argues that Mr. Cunningham also could have been confused by language on the annual benefits statement, which is sent to every City employee each year notifying the employee of the amount of their contributions and the name of the beneficiary on file who would receive those contributions *if the employee were to die prior to retirement* from City service. CP 89. This annual statement is not part of the Retirement Application completed by Mr. Cunningham and not discussed

during the retirement conference. In fact, the annual statement is completely irrelevant once the employee chooses a retirement option. Once the employee decides to retire, his pension will be based on the pension formula, not on the amount reflected on the annual statement. And, once the employee makes his or her retirement selection, the retirement contributions become part of the TERS fund from which the guaranteed payments will be made. See Hughes, infra, (a defined benefit fund is not made up of individual accounts and no retiree has a claim to the assets of the fund; a retiree's claim is for a defined monthly payment from the fund).

There is no evidence that Mr. Cunningham was confused by the annual statement or by the use of the word "Estate." On the contrary, all the evidence is that Mr. Cunningham knew what pension he wanted to receive, he selected that pension, and he began receiving benefits according to that selection without complaint.³

However, even if the word "Estate" and the information on the annual statement had caused confusion for Mr. Cunningham, evidence of such confusion cannot be admitted for the purpose of altering the terms of the written contract or for showing that one of the parties to the contract

³ Plaintiff claims that Mr. Cunningham's "Estate received none of the residue of the retirement funds" following the initial payment in January. CP 103. That is incorrect. The final pro rata payment for the month of Mr. Cunningham's death was deposited in his bank account on file, per the terms of the Unmodified plan. CP 126-127.

had a different intention than what is stated. “Unilateral or subjective purposes and intentions of what is written do not constitute evidence of the parties’ intentions.” Lynott v. National Union Fire Ins. Co., 123 Wn.2d 678, 689, 871 P.2d 146 (1994); Berg v. Hudesman, 115 Wn.2d 657, 669, 801 P.2d 222 (1990). Thus, even if Mr. Cunningham had a unilateral, subjective understanding that he could receive the higher payment of the Unmodified Option and still obtain after-death payments for his estate, a combination not available to any retiree, that mistaken belief would not alter the clear terms of the contract. There is no basis in law or fact for the Court to void the contract entered into by Mr. Cunningham.

There is no evidence that the City breached its agreement with Mr. Cunningham. Rather, all the evidence is that the City complied with Mr. Cunningham’s designation. The trial court properly dismissed the plaintiff’s claim for breach of contract.⁴

D. The trial court correctly dismissed the plaintiff’s claim of unjust enrichment because that cause of action is unavailable under the facts of this case.

Plaintiff contends the trial court erred in dismissing plaintiff’s claim of unjust enrichment. The gist of plaintiff’s unjust enrichment

⁴ The City has not argued plaintiff’s claim for declaratory judgment as a separate cause of action because it is subsumed within the breach of contract and unjust enrichment claims. The declaratory relief sought by plaintiff was to have the court find that regardless of the option chosen by Mr. Cunningham, pension benefits should be paid to Mr. Cunningham’s estate. CP 5. As stated in the City’s argument, there is no basis to void the terms of the retirement plan chosen by Mr. Cunningham.

argument is that it would be unfair for the TERS plan to keep Mr. Cunningham's retirement contributions after having paid out only a fraction of those contributions under the pension plan. However, the theory of unjust enrichment does not apply to the facts of this case. In addition, plaintiff's argument appears to be based, in part, on a misunderstanding of the nature of a defined benefit retirement plan.

Unjust enrichment is an equitable action that allows recovery for the value of the benefit retained **absent any contractual relationship** because notions of fairness and justice require it. Bailie Commc'ns Ltd. v. Trend Bus. Sys., Inc., 61 Wn. App. 151, 160, 810 P.2d 12 (1991) (emphasis added). A common application is when one party does work for another with the expectation of being paid for the services rendered and the one receiving the services knows or should know that payment is expected, but no actual contract exists. Young v. Young, 164 Wn.2d 477, 485-86, 191 P.3d 1258 (2008). See also, Top Line Builders, Inc. v. Bovenkamp, 179 Wn. App. 794, 806, 320 P.3d 130 (2014)(holding that the contractor should be paid for extra work that was verbally requested though no written change order had been created). Where no actual contract exists, the court may create an "implied in fact" contract because under the circumstances, it would be unjust for the defendant to retain the services without paying for them. Top Line, 170 Wn. App at 810.

In this case, however, an actual contract exists, making unjust enrichment unavailable to the plaintiff. Under Washington law, a retirement fund or pension plan to which employees make compulsory nonrefundable deductions from their salaries is a contract and the regular rules regarding contract interpretation apply. Bakenhus v. City of Seattle, 48 Wn.2d 695, 696, 296 P.2d 536 (1956). The contractual rights and obligations of the parties under a pension plan are to be measured by the terms of the contract and where the terms of the pension contract, taken as a whole, are plain and unambiguous, the meaning of the contract is to be deduced from its language alone. Wong, 26 Wn. App. at 561 (citing Jacoby, 77 Wn.2d at 916).

Because a contract actually exists, there is no basis for the court to create an implied in fact contract under the theory of unjust enrichment. The cause of action for unjust enrichment is simply not available under the facts of this case.

E. The trial court correctly dismissed the plaintiff's claim of unjust enrichment because the City has not been unjustly enriched.

Plaintiff's claim for unjust enrichment seems to be based on the idea that it would be unfair for TERS to retain the contributions Mr. Cunningham made to the fund even though that is a known aspect of the option Mr. Cunningham chose. Plaintiff points out that Mr. Cunningham

died when he had been paid what amounted to only a fraction of what he had contributed to the TERS plan. However, plaintiff's arguments that this is unfair or that it unjustly enriches the City appear to be based, in part, on a misunderstanding of the nature of a defined benefit plan.

"[A] defined benefit plan entitles the members to a predetermined distribution upon retirement and to an actuarially sound plan to ensure that the plan is adequately funded to meet those distribution requirements. It does not entitle [employees] to any use of the contributions other than to ensure the above entitlements are met." Retired Pub. Emps. Council of Wash. v. Charles, 148 Wn.2d 602, 616, 62 P.3d 470 (2002). Part of ensuring that a plan is actuarially sound is making sure that benefits are paid according to the terms of the plan, even though the "results may seem inequitable in a particular case." Jacoby, 77 Wn.2d at 921. The alternative would be unfair to current and future employees. Id.; See also, Wong, 26 Wn. App. at 563 ("We sympathize with the plaintiff-widow recognizing the emotional and financial loss which is hers. We cannot, however, grant her benefits under the plan for which she has not qualified. To grant benefits not due would jeopardize the financial soundness of the Employee Retirement Plan and imperil the position of all other members of the plan").

The U.S. Supreme Court gave a similar explanation of the nature of defined benefit retirement plan in Hughes Aircraft Co. v. Jacobson, 525 U. S. 432, 119 S. Ct. 755, 142 L. Ed. 2d 881 (1999), a case where retirees made a claim to a portion of the assets of the fund over and above their defined benefits. In Hughes, the Supreme Court held that retirees do not have any claim on the assets of a defined benefit plan. In reaching that decision, the Court explained the relevant differences between defined contribution plans and defined benefit plans:

A defined benefit plan consists of a general pool of assets rather than individual dedicated accounts. Such a plan, ‘as its name implies, is one where the employee, upon retirement, is entitled to a fixed periodic payment.’ Commissioner v. Keystone Consol. Industries, Inc., 508 U. S. 152, 154, 124 L. Ed. 2d 71, 113 S. Ct. 2006 (1993).

Hughes Aircraft Co. v. Jacobson, 525 U. S. 432, 439, 119 S. Ct. 755, 142 L. Ed. 2d 881 (1999). On the other hand, a defined contribution plan is one where employees and employers may contribute to the plan, and the employer’s contribution is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide. A defined contribution plan “provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant’s account. . . . [E]ach beneficiary is entitled to whatever assets are dedicated to his individual account.” Id.

Thus, plaintiff's statement that Mr. Cunningham's "retirement plan had approximately \$170,504.89 in value at his time of death" is inaccurate. Appellant's Brief at 2. Plaintiff's statement reflects a misunderstanding of a defined benefit plan because once the employee retires, there is no individual account that holds that retiree's contributions. Rather, as explained by both our state supreme court and the U. S. Supreme Court, there is a pool of assets and the retiree is entitled to fixed payment from the pool. Similarly, Plaintiff also makes the factually inaccurate statement that Mr. Cunningham's Estate was comprised of two assets: his home and his TERS retirement plan. Brief at 2. However, Mr. Cunningham's TERS plan was not part of Mr. Cunningham's estate and, under the plan chosen by Mr. Cunningham, could never have become part of Mr. Cunningham's estate. Plaintiff is also in error in stating that because Mr. Cunningham never identified a beneficiary during his life that the default beneficiary, an employee's estate, came into play upon Mr. Cunningham's death. This scenario is impossible because Mr. Cunningham had already retired at the time of his death, and his retirement contributions had automatically become part of the unsegregated asset pool at retirement. Again, this is necessarily so because of the nature of the defined benefit plan.

Plaintiff also claims that the City refused to pay the “residual benefits of Mr. Cunningham’s retirement account to his Estate, claiming that Mr. Cunningham elected that his entire retirement account go to the City in the event of his death.” Appellant’s Brief at 3. Again, there is no individual retirement account with a defined benefit plan. Hughes, at 439. Thus, contrary to plaintiff’s argument, the City is not claiming that Mr. Cunningham elected to direct his retirement account go to the City. Rather, Mr. Cunningham was entitled to a fixed monthly payment according to the terms of the plan. He chose a plan that paid the maximum monthly benefit, but did not provide for after-death payments to his estate or to any beneficiary. Characterizing the plan as having residual benefits in an account reflects the misconceptions that plaintiff has concerning a defined benefit plan. The plaintiff may not like how a defined benefit plan operates, but that is not a legally sufficient basis for asking the court to disregard the terms of the pension her father selected. Nor is it a legally sufficient basis under Washington law to find that the City has been unjustly enriched. The trial court properly dismissed the plaintiff’s claim for unjust enrichment.

- F. **The trial court erred in excluding the testimony of City employees under the Deadman’s Statute because the Statute does not apply under the facts of this case and because the plaintiff waived the Statute by putting the City employees’ statements at issue.**

The City agrees with the trial court that, even without the statements of the City employees, the City is entitled to summary judgment.⁵ However, the City appeals the trial court's exclusion of the testimony of Marni Moore and Cecilia Moulett because, under the facts of this case, those statements should not be excluded under the Deadman's Statute.

Under RCW 5.60.030, the so-called Deadman's Statute, an interested party is barred from testifying about a transaction with a deceased person in order to "prevent interested parties from giving self-serving testimony about conversations or transactions with the decedent." Erickson v. Kerr, 125 Wn.2d 183, 187, 883 P.2d 313 (1994)(quoting Wildman v. Taylor, 46 Wn. App. 546, 549, 731 P.2d 541 (1987)). A person is an interested party for purposes of RCW 5.60.030 when he or she stands to gain or lose as a direct result of the outcome of the lawsuit. Bentzen v. Demmons, 68 Wn. App. 339, 345, 842 P.2d 1015 (1993).

"The witness will be considered interested only if the witness's interest is present, certain, and vested." 5A Karl B. Tegland,

⁵As to whether the City employees' statements were necessary to its ruling, the trial court remarked, "None of that matters, does it?" VRP 10:21. The court found that even without the statements of the City witnesses, and looking only at the documents provided to Mr. Cunningham or signed by Mr. Cunningham, there were no genuine issues of material fact to preclude summary judgment. VRP 10: 23 to 11:4.

EVIDENCE:WASH. PRAC. §601.17 (5th ed. 2007) (emphasis added).
“An interest that is uncertain, remote, or contingent is insufficient to bar the witness’s testimony.” Id.; See also, Rice v. Life Ins. Co. of N. Am., 25 Wn. App. 479, 483, 609 P.2d 1387 (1980), review denied, 93 Wn.2d 1027 (1980)(holding that the witness was not an interested party because the witness “could not gain or lose by the direct legal operation and effect of the judgment of the trial court. The mere contingency of loss she may, or may not, face in the future is insufficiently ‘direct and certain’ to disqualify her testimony.”).

Plaintiff concedes that the employee-employer relationship does not render the employee an interested party for purposes of the deadman Statute. CP 95. Plaintiff must also concede that with a defined benefit plan such as TERS, the health of the plan will not affect how much any City employee will receive upon retirement because that amount is guaranteed to the retiree regardless of the health of the plan. See, Hughes Aircraft, 525 U.S. at 439. Even more specifically, plaintiff must concede that City witnesses have no personal interest in whether or not the fund retains Mr. Cunningham’s contributions because the amount that a retiree receives in a TERS retirement is based on years of service and annual salary, not on the amount of assets in the fund. Whether Mr.

Cunningham's contributions are retained or not cannot have any impact on City witnesses' own retirements.

Nevertheless, plaintiff argues that all City employees are interested parties because they contribute to the TERS plan as a condition of their employment and thus, according to plaintiff, have an "interest in the preservation of plan assets." CP 95. This argument is contrary to Washington law, which requires a direct, immediate and certain impact before testimony is excluded. See, e.g., Rice, 25 Wn. App. at 483. Moreover, the City witnesses that assisted Mr. Cunningham in filling out his retirement forms did so as part of their jobs. Their testimony is not the sort of self-serving testimony the Deadman's Statute seeks to preclude. See e.g., Parks, 173 Wn. App. at 375 (purpose of Statute is to preclude self-serving testimony "because the dead cannot respond to unfavorable testimony"). In this case, City employees have nothing to gain by their testimony and no unfavorable testimony to provide about the decedent.

Under Washington law, Ms. Moore and Ms. Moulett are not interested parties and their testimony should not be excluded under the Deadman's Statute.

- G. **Plaintiff has waived the Deadman's Statute by pleading portions of the very same conversations she seeks to preclude.**

The Deadman's Statute is also not available to the plaintiff in this case because plaintiff waived the Statute. Plaintiff claims that the conversations that Mr. Cunningham had with Ms. Moore and Ms. Moulett, City of Tacoma Retirement Department employees, are inadmissible under the Deadman's Statute. Yet, at the same time, plaintiff's claims for intentional and fraudulent misrepresentation require proof a false communication to Mr. Cunningham, and the plaintiff asserts that this representation was made by Ms. Moore. See e.g., CP 99-100; Appellant's Brief at 8-9. In addition, plaintiff claimed on summary judgment, and also claims on appeal, that there are genuine issues of material fact regarding what Ms. Moore and Ms. Moulett said to Mr. Cunningham while he was completing his retirement paperwork making summary judgment improper. Appellant's Brief at 1.

Plaintiff cannot have it both ways: contend that the content of the conversations is admissible evidence when offered by the plaintiff on the misrepresentation claims but inadmissible evidence on the basis of the Deadman's Statute when offered by the defendant. It is well-established that in such a situation, the plaintiff waives the Deadman's Statute. Erickson v. Kerr, 125 Wn.2d 183, 187-88, 883 P.2d 313 (1994)(the Statute may be waived if the adverse party introduces testimony on direct or cross-examination regarding the transaction in question); Zvolis v.

Condos, 56 Wn.2d 275, 277, 352 P.2d 809 (1960)(where the Statute is waived at all, it is waived as to all facts pertinent to the matters testified to); Bentzen v. Demmons, 68 Wn. App. at 345(“Once the protected party has opened the door, the interested party is entitled to rebuttal.”)(citing Johnson v. Medina Imp. Club, Inc., 10 Wn.2d 44, 59-60, 116 P.2d 272 (1941)) (waiver occurred when elicited testimony about issue relevant to litigation even though testimony did not involve specific transaction).

Given that the transactions between Ms. Moore and Mr. Cunningham are central to the plaintiff’s claims, the plaintiff has waived the Statute. Thus, the statements of Ms. Moore and Ms. Moulett concerning their interactions with conversations with Mr. Cunningham are admissible and the trial court erred in ruling that the Deadman’s Statute excludes them.

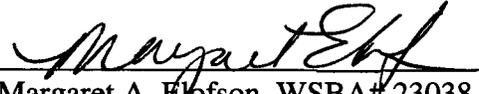
VI. CONCLUSION

The trial court’s decision on summary judgment should be affirmed. The plaintiff simply has no evidence to support her causes of action. Therefore, the defendant respectfully requests this Court to affirm the trial court’s ruling on summary judgment.

To the extent that this court reverses the trial’s summary judgment dismissal, the City requests that this court also reverse the trial court’s ruling concerning the Deadman’s Statute.

Dated this 28th day of October, 2015.

ELIZABETH A. PAULI, City Attorney

By: 
Margaret A. Elofson, WSBA# 23038
Deputy City Attorney
Attorney for Respondent
747 Market Street, Suite 1120
Tacoma, WA 98402
(253) 591-5885
Fax (253) 591-5755

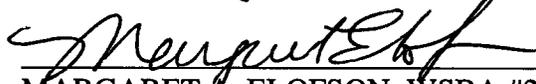
CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October, 2015, I filed, through my staff, the foregoing with the Clerk of the court for the Court of Appeals, Division II, for the State of Washington via electronic filing.

A copy of the same is being emailed and mailed, via U.S. mail, and/or via ABC Legal Messenger to:

C. Tyler Shillito WSBA #36774
Morgan K. Edrington WSBA#46388
Attorneys at Law
Smith Alling, P.S.
1515 Dock Street, Suite 3
Tacoma, WA 98402
wk: (253) 627-1091
fax: (253) 627-0123
tyler@smithalling.com
morgane@smithalling.com

DATED this 28th day of October, 2015.


MARGARET A. ELOFSON, WSBA #23038

TACOMA CITY ATTORNEY

October 28, 2015 - 4:17 PM

Transmittal Letter

Document Uploaded: 6-476576-Respondent's Brief.pdf

Case Name:

Court of Appeals Case Number: 47657-6

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Margaret A Elofson - Email: margaret.elifson@ci.tacoma.wa.us

A copy of this document has been emailed to the following addresses:

aborgen@ci.tacoma.wa.us

sblack@ci.tacoma.wa

tyler@smithalling.com