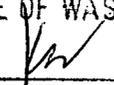


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  _____
DEPUTY

NO. 48064-6-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

ST. MARTIN'S UNIVERSITY,

Appellant,

vs.

CARMEN FLORES, et. al.,

Respondent.

RESPONDENT'S OPENING BRIEF

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I. INTRODUCTION

The Respondent herein, Carmen Flores, is a 2002 graduate of Saint Martins University (Saint Martins). She became a counselor in the Juvenile Justice System after she graduated. Unfortunately, time is not a friend to either party in this case. Carmen was the beneficiary of about 6 forms of financial aid when she attended Saint Martins. The “Perkins loans” that were taken out by Carmen were taken out in 1997-98. She had no personal records regarding any Perkins Loans by the date the case was filed, January 4, 2014. The “dishonored check” referred to by Saint Martin’s was a payment demanded by Saint Martin’s staff when Carmen attempted to obtain a copy of her transcript for a job application in late 2008.

II. ASSIGNMENT OF ERROR: N/A

III. STATEMENT OF THE CASE

It is undisputed that the Carmen attended college at St. Martin’s University (fka, St. Martin’s College) (Saint Martin’s) from 1997 until she graduated in May, 2002.

For purposes of the underlying Summary Judgment and this Appeal, Carmen would have the court assume that the debts described in the Complaint were incurred by Carmen and that she cannot prove she satisfied these debts at any time before the date the Complaint was filed.

Saint Martin’s filed their Complaint on January 4, 2014. CP, pp. 6-7. The Complaint filed by Saint Martins is just two pages, contains two

independent claims which may be found on page 2, section III, and there are no attachments.

Saint Martin's first claim was, "*Defendant Carmen Flores became indebted to Plaintiffs for education services provided to Defendant beginning on or around October 3, 1997. Despite their demands the Defendant has failed to pay as required and there is due and owing \$1900.00, plus interest at the rate of 5% from October 3, 1997 plus collection costs of \$1484.51.*" CP, pp. 6-7, p. 7, lines 1-4. This is the total statement of claim for what will be referred to as Claim No. 1. There is no reference to anything specific; no reference to "student loan;" no reference to any specific type of student loan; and, no reference to any form of "check."

Saint Martin's second claim was, "*Defendant Carmen Flores became indebted to Plaintiffs for education services provided to Defendant beginning on or around January 1, 2003. Despite their demands the Defendant has failed to pay as required and there is due and owing \$642.85, plus interest in the rate of 12% from November 18, 2008 plus collection costs of \$475.75.*" Id, lines 5-8. This is the total statement of claim for what will be referred to as Claim No. 2. There is no reference to anything specific; no reference to "student loan;" no reference to any specific type of student loan; and, no reference to any form of "check."

This claim language is all the claim language used by Saint Martin's in their Complaint. There were no attachments to the Complaint;

there were no reference made to any documents; and, there were no reference to any book keeping records.

According to the Proof of Service, Carmen was personally served with one “true copy” of just the Summons and Complaint on October 26, 2013. CP, p. 8.

Carmen filed her Answer to Complaint and Counter-claims on April 16, 2014. CP, pp. 38-45. Her Answer contained a number of affirmative defenses including Washington’s Statute of Limitations. She even qualified her Statute of Limitations affirmative defense by adding the following language as a footnote:

The Complaint does not refer to the alleged debts as “Student Loans” and the two pleadings entitled Declaration and Assignment of Deborah Long don’t refer to the alleged debts as “Student Loans” and the attachments don’t clearly demonstrate the alleged debt directly corresponds to a “Student Loan” and the unfiled response to Carmen Flores’ demand for proof of debt doesn’t contain any good reason to assume that the Plaintiff can avoid a Statute of Limits defense using a “Student Loan” exception.

Saint Martins filed their Answer to Counter Claims on July 16, 2014. CP, pp. 58-59.

Saint Martins never amended their Complaint prior to arbitration.

The case proceeded to arbitration on March 25, 2015, pursuant to Thurston County Local Rules. CP, pp. 135-141. The Arbitration Award, which has been sealed, was filed on April 13, 2015. Id. Saint Martins filed a Request for Trial De Novo on April 23, 2015. CP, p. 142 (contains wrong cause number).

After 3 months and Saint Martin's taking no action to try the case, Carmen filed her Motion for Summary Judgment on July 16, 2015. CP, pp. 146-171.

Saint Martin's never asked the Trial Court's to amend the Complaint in between the arbitration and the court hearing the Motion for Summary Judgment. However, Saint Martin's filed a Response to Summary Judgment on August 13, 2015. CP, pp. 193-195. This Response introduced the terms "Perkins loan," "student loan," and "dishonored check" as if they'd been a part of the case all along.

The Motion for Summary Judgment was heard on August 21, 2015, by the Honorable Gary R. Tabor. The Order that is currently on appeal was entered on that day. CP, pp. 220-222. Saint Martin's filed their Notice of Appeal on September 21, 2015. CP, pp. 223-227.

IV. STANDARD OF REVIEW

"We engage in the same inquiry as the trial court when we review an order on summary judgment, treating all facts and reasonable inferences from the facts in the light most favorable to the nonmoving party. Folsom v. Burger King, 135 Wash.2d 658, 663, 958 P.2d 301

(1998). The burden is on the party moving for summary judgment to demonstrate that there are no genuine issues of material fact. Id. A party may move for summary judgment by setting out its own version of the facts or by alleging that the nonmoving party failed to present sufficient evidence to support its case. Guile v. Ballard Cmty. Hosp., 70 Wash.App. 18, 21, 851 P.2d 689 (1993). If the moving party uses the latter method, it must "identify those portions of the record, together with the affidavits, if any, which ... demonstrate the absence of a genuine issue of material fact." Id. at 22, 851 P.2d 689. Once the moving party has met its burden, the burden shifts to the nonmoving party to present admissible evidence demonstrating the existence of a genuine issue of material fact.

Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wash.2d 16, 27, 109 P.3d 805 (2005). If the nonmoving party cannot meet that burden, summary judgment is appropriate. Id." Pacific Northwest Shooting Park Association v. the City of Sequim, 158 Wn.2d 342, 350-351, 144 P.3d 276 (2006).

V. CARMEN'S ARGUMENTS

A. SAINT MARTIN'S FAILED TO AFFIRMATIVELY PLEAD THEIR CASE

1. Saint Martin's Complaint does not identify their Claim No. 1 as a "Perkins Loan" or "student loan" nor does their Claim No. 2 mention a "dishonored check"

Saint Martin's Complaint does not refer to either alleged debt as a "Perkins Loan," "student loan" or as a "dishonored check." CP, pp. 6-7. CR 8(a) says, "A claim ... shall contain (1) a

short and plain statement of the claim showing that the pleader is entitled to relief . . .” CR 8(a)(1). Carmen would agree with Saint Martin’s that the Complaint contains two plain statements. Both Claim No. 1 and Claim No. 2 vary in values, but they are both identify “debts . . . for educational services . . .” Carmen **does argue** that the descriptions do not contain enough specificity to understand that Saint Martin’s would rely on some special exception to the usual law related to debt enforcement. Carmen **does argue** that there is no reference to check.

A Washington, case that seems applicable here reads, “While inexpert pleadings may survive a summary judgment motion, insufficient pleadings cannot. Lewis v. Bell, 45 Wash.App. 192, 197, 724 P.2d 425 (1986). Washington is a notice pleading state and merely requires a simple concise statement of the claim and the relief sought. CR 8(a). Complaints that fail to give the opposing party fair notice of the claim asserted are insufficient. Dewey v. Tacoma Sch. Dist. No. 10, 95 Wash.App. 18, 26, 974 P.2d 847 (1999) (stating that a party who fails to plead a cause of action "cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along.")” Pacific, at 352 (emphasis added). Saint Martin’s describing Claim No. 1, for the first time, as “Perkins Loan” and “student loan” in their

Response to Summary Judgment is exactly the type of action that leads to giving a party insufficient notice.

2. Saint Martin's never asked the Trial Court for leave to amend their Complaint

Saint Martin's never asked the court to amend their Complaint. "Under CR 15, after an opposing party has filed an answer, a party may amend its pleading only by leave of the court, and the court is instructed to freely grant leave when justice so requires." Bank of Am. v. Hubert, 153 Wash.2d 102, 122, 101 P.3d 409 (2004). Saint Martin's could have asked the court to change their Claim No. 1 from "debt . . . for educational services" to "unpaid Perkins Loan" and identified "federal preemption" in order to give notice to Carmen of their intent to raise such an avoidance to Washington's Statute of Limitations prior to arbitration. Saint Martin's could have asked the trial court to allow them to amend their Claim No. 2 from "debt . . . for educational services" to "dishonored check" prior to arbitration. Saint Martins did not make such a request so the Claims must stand as written.

3. Saint Martin's attempt to redefine their claims to those of "Perkins Loan," "dishonored check," and bring in "federal preemption" well after the arbitration decision had been rendered is prejudicial to Carmen

Carmen prepared for arbitration based on the claims as described in the Complaint. Carmen prepared her Motion for Summary Judgment based on the claims described in the

Complaint. Washington cases interpreting CR 15(a) suggest that it would be very prejudicial for the trial court or the Court of Appeals to allow the redefinition of Saint Martin's claims and attempted use of preemption to avoid Washington's Statute of Limitations after the arbitration has been completed. E.g., Wilson v. Horsley, 137 Wn.2d 500, 974 P.2d 316 (1999).

In Wilson, the Washington Supreme Court was persuaded that the trial judge's disallowance of an amended Complaint after arbitration was within the court's discretion and the Supreme Court declined to over rule the trial judge on that matter. Wilson, at 507 (Unfair surprise is a factor which may be considered in determining whether permitting amendment would cause prejudice.)

This case was fully arbitrated based on the Complaint as written. The Summary Judgment Motion was decided based on the Complaint as written. And, it would prejudice Carmen if she were required to start over. Starting over is essentially what will happen if Saint Martin's is allowed to amend their Complaint language so far into the case. In fact, the case has never been arbitrated based on "Perkins Loan," "dishonored check," or "federal preemption," so it is possible that the matter would have to return to arbitration if this court grants the appeal.

4. Saint Martin's redefining their general allegation of debt claims in their "Plaintiff's Response to Summary Judgment" amounts to a violation of CR 15

Saint Martin's attempted to change their claims after Carmen filed her Motion for Summary Judgment. The way that Saint Martin's attempted to introduce their claim changes is similar to the way that PNSPA attempted to in the Pacific case and similar to how others attempted to introduce or change claims in these other cases. Here are some examples to illustrate the wrong way of amending a Complaint:

[Ex] In Pacific, "PNSPA did not introduce its claim of *interference with its business expectancies with vendors and the general public* until it responded to the city's motion for summary judgment. Well before responding to the summary judgment, PNSPA requested leave to amend its complaint, however, it did so only to add a claim for breach of contract, not to amend the interference claim. But PNSPA now urges this court to consider its new interference argument as if that were what it had argued all along." Pacific, at 352.

[Ex] In the Lewis case, the pleader failed to include "*assault*" in the Complaint. They only alleged "outrage." Lewis, at 197. And, the court of appeals didn't allow the

tort of “*assault*” to be raised for the first time on appeal.

Id.

[Ex] In the Dewey case, Dewey raised an 8th and 9th claim in response to the School District’s Motion for Summary Judgment. The Division II Court of Appeals didn’t allow the claims of (1) *retaliatory discharge* and (2) *wrongful discharge* to the 7 other tort claims found in the Complaint. Dewey, at 26:

Here, Saint Martin’s attempted to change their Claim No. 1 from “indebted . . . for educational services” to “Perkins Loan” for the first time in their Plaintiff’s Response to Summary Judgment. CP, pp. 193-195. Saint Martin’s hadn’t asked the trial court’s leave to amend their Complaint pursuant to CR 15(a). Saint Martin’s just included the term “Perkins loan” in Plaintiff’s Response to Summary Judgment in order to bootstrap the exemption claim that they relied on in defense of that Motion for Summary Judgment. Per the above cited cases, Saint Martin’s may not make such a change in the manner that they attempted to.

Also, Saint Martin’s attempted to change their Claim No. 2 from “indebted . . . for educational services” to “dishonored check” for the first time in Plaintiff’s Response to Summary Judgment. And, Saint Martin’s Brief describes the check, for the first time in on appeal, citing Chapter 62A RCW. Specifically, the Brief

describes the check as “draft” and “negotiable instrument” subject to the Washington Uniform Commercial Code . . .” Saint Martin’s Opening Brief, p. 18. Had Claim No. 2 been identified with such specificity in the Complaint, perhaps Carmen would have listed the following as an additional affirmative defense: “The drawer or maker of an instrument has a defense if the instrument is issued without consideration.” RCW 62A.3-303(b). If the appellate court relies on Saint Martin’s Claim No. 2 description changes, it seems that the court will be allowing Saint Martin’s to effectively bypass CR 15 and even prejudice Carmen by making her commit to new affirmative defenses for the first time on appeal.

Per the above cited cases and CR 15, Saint Martin’s may not make such changes in the manner that they are still attempting to do.

B. 12-17 YEAR OLD, NON-SPECIFIC “DEBTS . . . FOR EDUCATION SERVICES” ARE SUSCEPTABLE TO WASHINGTON’S STATUTE OF LIMITATIONS

1. Saint Martin’s failure to initiate their law suit until after six years from the date either debt became due left Saint Martin’s susceptible to Washington’s Statute of Limitations (RCW 4.16.040(2))

RCW 4.16.040(2) applies to both of Saint Martin’s claims as described in their Complaint. RCW 4.16.040(2) provides, “The following actions shall be commenced within six years: (1) An action upon a contract in writing, or liability express or implied

arising out of a written agreement. (2) An action upon an account receivable incurred in the ordinary course of business.”

The Complaint describes both of Saint Martin’s Claims as “debt . . . for educational services.” CP, pp. 6-7, p. 7. Saint Martin’s filed their own Motion for Summary Judgment on May 27, 2014. CP, pp. 47-50. This pleading was never served on Carmen or argued to the trial court, but it was filed prior to the arbitration. Saint Martin’s Motion for Summary Judgment continued to identify the claims as “money due upon educational services provided” and the only other comment was “At issue is a balance that remains due and owing . . . \$1,900.00 . . . \$642.85 . . .” CP, pp. 47-50, p. 47, lines 23-24 and page 48, lines 4-10. This is how Saint Martin’s described their claims even after Carmen described why she was raising the Statute of Limitation defense in her Answer (with such specificity).

RCW 4.16.040(2) requires a claimant to make a claim on a debt based on a writing within 6 years of default. Tingey v. Haisch, 159 Wn.2d 652, 665, 152 P.3d 1020 (2007). As for Saint Martin’s claim for \$1,900.00, the Complaint says that the \$1900.00 has been due and owing since 1997. If so, Saint Martin’s needed to have filed the claim no later than some time in 2003.

As for Saint Martin’s claim for \$642.85, it is clearly a ledger balance that Saint Martin’s has been attempting to collect

since 2002. For this part of the argument, Carmen will introduce three pages that were introduced at arbitration and used as exhibits in support of Carmen's Motion for Summary Judgment. The court may note that by April 25, 2002, the balance owed is \$541.50. CP, pp. 146-171, p. 154 (identified as Exhibit 7). By December 31, 2002, interest and an "In House Collection Fee" had been added resulting in a new balance of \$600.51. CP, pp. 146-171, p. 155 (identified as Exhibit 8). And, by April 30, 2003, the balance had grown to the same amount as the check at issue, \$622.85. CP, pp. 146-171, p. 156 (identified as Exhibit 9). It is disingenuous for Saint Martin's to suggest that Claim No. 2 is any more than an attempt to collect a debt that became due and owing as of April 25, 2002, and has been void since April 25, 2008.

"The applicable rule is that a loan of money payable on demand creates a present debt, and the statute of limitation begins to run against the lender from the date of the loan." Estate of Hopper v. Hemphill, 19 Wn.App. 334, 336, 575 P.2d 746 (Div. 1, 1978), citing, 54 C.J.S. Limitations of Actions § 130 (1948). If the court applies the Hopper case to the underlying obligations, the time to collect on those debts began to run, on the \$1900.00 claim, on or about October 3, 1997, and with respect to the \$642.50 claim (actually \$622.50), the debt began to run on April 25, 2002. If the court applies Washington's Statute of Limitations, RCW

4.16.040(2), these obligations became null and void on October 3, 2003, and April 25, 2008, respectively.

2. Saint Martin's has the burden of proving either Claim survives Washington's Statute of Limitations and Saint Martins has failed to meet this burden

Saint Martin's argued, in their Response to Summary Judgment, that "Under Washington Law, it is immaterial what the basis of the underlying obligation was." CP, pp. 193-195, p. 194, line 9. We respectfully disagree with the idea that the reason for writing a check is "immaterial." First, Claim No. 2 contains two dates, "January 1, 2003," and "November 18, 2008." The next part of Claim No. 2 says, "Despite demands the Defendant has failed to pay as required and there is now due and owing \$642.85, plus interest in the rate of 12% . . ." Why put in "January 1, 2003" in your 2013 Complaint if "the basis for the underlying obligation was" immaterial?

Next, we all know that if a person writes a check in order to make a partial payment on an account, the statute of limits starts afresh. RCW 4.16.270.

Next, case history may be applied here as well. "'Where circumstances are relied upon to toll the running of the statute of limitations, they must show a clear and unequivocal intention on the part of the obligor to keep alive the debt.'" Walker v. Sieg, 23 Wn.2d 552, 561, 161 P.2d 542 (1945) (quoting Stockdale v.

Horlacher, 189 Wash. 264, 267, 64 P.2d 1015 (1937)).” Kelly vs. Alliance Life Insurance Company of North America, 178 Wn.App. 395, 401, 314 P.3d 755 (Div. 3, 2013).

The only affirmative act by Carmen (as an alleged obligor) is that she wrote this check on November 18, 2008. There are no facts suggesting that the Carmen’s writing of the check was intended to preserve either Claim set forth in the Complaint.

3. Saint Martin’s argument that the check, not the ledger balance set forth in Saint Martin’s bookkeeping records, is the basis for Claim No. 2 must fail for want of consideration

Saint Martin’s description of the check as a “negotiable instrument” or “draft” as defined by Chapter 62A.3 RCW is misplaced unless the check can be connected to some valid “consideration.” RCW 62A.3-303(b) provides, “The drawer or maker of an instrument has a defense if the instrument is issued without consideration.” It is undisputed that Carmen has not done business with the Saint Martin’s since the Carmen graduated from college in May, 2002. So, there is no consideration to attach the check to. Lack of consideration leaves the check as meaningless paper.

4. The check was not part of the original Complaint and any opportunity to enforce the check has also passed

It’s obvious that the Complaint doesn’t reference a check.

The check referenced in Saint Martin’s Response to Summary

Judgment and Saint Martin's Appellant's Brief was written on November 18, 2008. Assuming there is consideration supporting Carmen's issuance of this check, the holder of such a check would need to bring suit on it within six years of it being written. That opportunity passed on November 18, 2014. Since no such claim has been filed or served yet, that claim must fail.

C. CARMEN IS ENTITLED TO ATTORNEY'S FEES

Carmen is entitled to have her attorney's fees granted. Chapter 4.84 RCW applies here in the same way it was applied by Judge Tabor. Additional fees should be allowed for the time associated with defending the Appeal.

VI. CONCLUSION

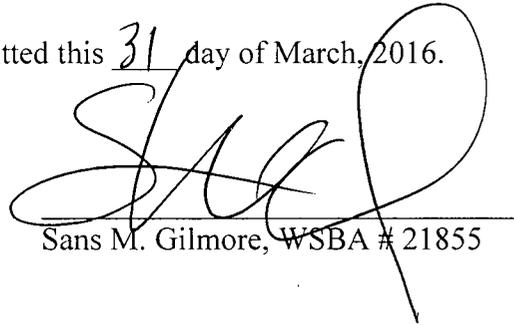
This appeal should be denied. Saint Martin's two claims are for "debt . . . for educational services" and not specifically identified as "Perkins Loan" or "student loan" and certainly not "dishonored check" in any of the pleadings prior to Saint Martin's filing their Plaintiff's Response to Summary Judgment. Washington's Statute of Limitations, RCW 4.16.040(2), applies to non-specific debts such as those described in the Complaint. Saint Martin's failed to toll the Statute of Limitations for either of these debts and both debts are void.

The check specifically fails because it was never plead and the time for enforcement has passed and/or there is no consideration to connect to the check.

Saint Martin's attempted to redefine their claims in their Response to the Summary Judgment and in their Appellant's Brief, without obtaining the court's permission. This cannot be allowed. Saint Martin's never utilized CR 15. So, Saint Martin's Claims must stand as described in the Complaint and such Claims are susceptible to Washington's Statute of Limitations.

There is no issue of material fact. This court should uphold the trial court's summary determination. And, this court should grant Carmen additional attorney's fees for having to defend this appeal.

Respectfully submitted this 31 day of March, 2016.



Sans M. Gilmore, WSBA # 21855

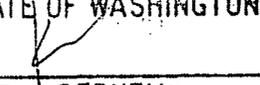
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DIVISION II

Declaration of Transmittal

2016 APR 1 AM 9:43

Under penalty of perjury under the laws of the State of Washington I
affirm the following to be true:

STATE OF WASHINGTON

BY 
DEPUTY

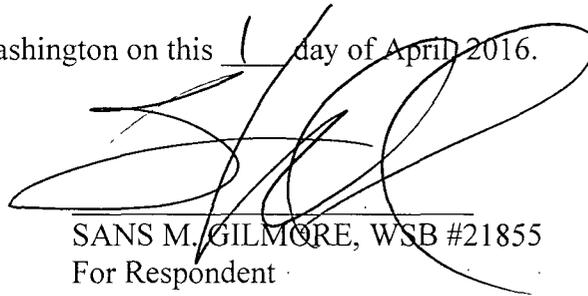
Our offices received a final copy of Appellant's Opening Brief on March 4, 2016. Other versions were transmitted but Mr. Huegunin sent me their final version on March 4, 2016. .

I transmitted Respondent's Opening Brief by personal service to:

Washington State Court of Appeals
Division II
950 Broadway, Ste. 300
Tacoma, WA 98402

on April 1, 2016, and by either hand delivery to or electronic service (pre-arranged and agreed to by Saint Martins) on the same day to Appellant's attorney of record, Mr. Francis Huegunin.

Signed at Tumwater, Washington on this 1 day of April 2016.



SANS M. GILMORE, WSB #21855
For Respondent
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