



No. 29454-4-III

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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PRIME REAL ESTATE CLOSING & ESCROW INC. ET AL  
Plaintiff/Respondents

v.

CRAIG R. HEBERLING  
Appellant/Defendant,

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Reply Brief of Appellant HEBERLING

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APPELLATE  
COURT OF APPEALS  
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CLERK OF COURT

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## REPLY ARGUMENT

### 1. Unjust Enrichment

Factually, HEBERLING learned that the wrong loan was paid off: so he had property which was double-encumbered. He borrowed money that could have been used to pay off one loan. Instead he decided to use the money for additional investments, and he paid the monthly payments on both loans for several months. Those didn't work out, however; he couldn't sustain the cash flow, couldn't make the payments and eventually defaulted both loans. The Title insurer then had to pay the 2<sup>nd</sup> mortgage since it was undersecured; they in turn, months later, sought reimbursement from Prime Closing.

*Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (Wash. 2008) noted that "Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice

require it. But the Court was clear that:

Three elements must be established in order to sustain a claim based on unjust enrichment: a benefit conferred upon the defendant by the plaintiff; an appreciation or knowledge by the defendant of the benefit; and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.

The problem is that what comprise “unjust” circumstances is very hard to define. In fact Division II in *Davenport v.*

*Washington Educ. Ass'n*, 147 Wn.App. 704, 197 P.3d 686

(2008), commented that:

This formulation [Restatement (Third) ) § 1 cmt. b at 3] encompasses such a " wide variety," Restatement (First) at 1, of situations that **it may be equivalent to stating that one person enriches another unjustly when the facts and circumstances of the particular case so indicate.**

That being said, the cases still require the trial court to find the basic elements, and those are lacking in this case.

#### **A. Benefit**

HEBERLING was spared potential liability, but the

probability of actual injury was never established.

**B. No Proof of Knowledge or appreciation**

HEBERLING could not know he was being unjustly enriched because, when he acted in August 2007, PRIME had no obligation to the Title Company. [CP 139] PRIME's obligation arose almost two years later . [ CP 50] Mr. HEBERLING had no knowledge that PRIME would or could face liability.

**C. Not Unjust**

Clearly PRIME was in the wrong or it would not have paid money to the Title Company. PRIME is not a fault-free.

HEBERLING acted in good faith when he used the Option One loan. There was no recognizable reason for him to pay of the incorrectly applied loan as long as he had a reasonable expectation of keeping payments current.

But we assert the big issue is mitigation: HEBERLING was obligated to mitigate, *Cobb v. Snohomish County*, 86 Wn.

App. 223, 935 P.2d 1384 (1997). In *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 100 P.3d 791 (2004) the Court held,

A wide latitude of discretion must be allowed to the person who by another's wrong has been forced into a predicament where he is faced with a probability of injury or loss. Only the conduct of a reasonable man is required of him. If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen.

The only way Mr. HEBERLING's conduct is unjust is if he is not allowed the option to make a reasonable choice to mitigate.

## **2. A Question of Fact Exists as to Prime's Liability**

PRIME owed the duty to follow instructions and exercise ordinary skill in performing its role. There is a fact question whether PRIME's failure to clarify the correct loan, given the numerous "clues" it had that there was a problem, comprised a breach of both duties. Prime was aware that there was confusion over the correct loan to pay off, but did not exercise the degree of care its own policies demanded to resolve the

question.

### **3. Proximate Cause**

HEBERLING's decision to use the Option One loan for other investment was not unforeseeable. Indeed, as mitigation, it was required of him. *Cobb v. Snohomish County*, 86 Wn. App. 223, 935 P.2d 1384 (1997).

### **CONCLUSION**

Summary Judgment was incorrect and should be reversed.

March 14, 2011

Van Camp & Deissner

A handwritten signature in black ink, appearing to read 'Dustin Deissner', written over a horizontal line. The signature is stylized with loops and a long horizontal tail.

Dustin Deissner WSB# 10784  
Attorney for Appellants

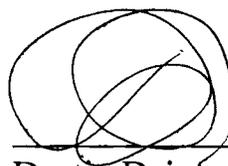
CERTIFICATE OF SERVICE

DUSTIN DEISSNER certifies upon penalty of perjury:

I have on this date served the foregoing document upon the following parties by the following means:

TO:	BY:
Elizabeth Telleson Winston & Cashatt 601 W. Riverside Ste. 1900 Spokane WA 99201	<input type="checkbox"/> US Mail 1 <sup>st</sup> Class Postage Prepaid <input checked="" type="checkbox"/> Delivery Service <input checked="" type="checkbox"/> Facsimile to: <input type="checkbox"/> Email <input type="checkbox"/> Hand Delivery
Everett Coulter Evans Craven & Lackey 818 W. Riverside Ste. 250 Spokane WA 99201	<input type="checkbox"/> US Mail 1 <sup>st</sup> Class Postage Prepaid <input checked="" type="checkbox"/> Delivery Service <input checked="" type="checkbox"/> Facsimile to: <input type="checkbox"/> Email <input type="checkbox"/> Hand Delivery

March 14, 2011



Dustin Deissner