

NO. 68-112-5-I

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION I

FRED PALIDOR,

Appellant,

v.

DAVID HOVDE, HARVEY AND JUDITH FLAX
LIVING TRUST, JUDITH FLAX, HARVEY
FLAX and their marital community, KEYWEST
LOCK SERVICE, INC., GREGORY PURCELL,
JANE DOE PURCELL, and their marital
Community,

Respondents.

Appeal from Whatcom County Superior Court
No. 10-2-03266-1

APPELLANT FRED PALIDOR'S
REPLY BRIEF

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2012 JUL 26 PM 3:50
COURT OF APPEALS
STATE OF WASHINGTON
JUL 26 2012

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I. INTRODUCTION

Appellant Fred Palidor submits this reply memorandum in reply to the briefs filed by the respondents in this case.¹ Respondents do not contest that their actions in trespassing on Nancy Taylor's leasehold, changing the locks and barring Ms. Taylor and her business from the premises were unlawful. They do not even dispute that they exercised unlawful coercion against Nancy Taylor. Respondents argue that Fred Palidor has no right to recover the funds he paid under duress because they only meant to target Nancy Taylor, and as the tenant only she has the right to recover the funds. Respondents contentions are contrary to the facts and law applicable to the case. In justice the claim to the funds belongs to only one person: Fred Palidor. The court should reverse the judgment of the trial court and pursuant to RAP 12.2 direct the trial court to enter judgment in favor of Fred Palidor on each of the three counts and, or in the alternative, direct the trial court to conduct further proceedings with Fred Palidor as the real party in interest.

II. ARGUMENT

¹ The Flax Respondents submitted the main brief on appeal, which the Locksmith Respondents adopted and incorporated into their own brief. References herein to "Respondents' Brief" or "RB" refer to the Flax Respondents' Brief.

A. The Standard of Review for Determining Whether Fred Palidor is a Real Party in Interest is *De Novo*.

The Flax Respondents concede that the standard of review for determining the real party in interest is *de novo*. **RB**, at p. 6. There is thus no dispute that the court performs its review of this issue without deference to the trial court's reasoning or result. ² Davenport v. Wash. Education Assoc., 147 Wn.App. 704, 715, 197 P.3d 686 (2008). The court takes the facts alleged in the complaint, and hypothetical facts consistent therewith, in the light most favorable to the plaintiff. Id. Where matters outside the pleadings are considered, the court treats those matters in the light most favorable to the plaintiff, consistent with the standards of summary judgment. CR 12(b).

B. Fred Palidor is Not Seeking to Enforce Rights Under the Lease.

Respondents argue that Fred Palidor can have no possible claim under any legal theory for return of the \$10,000 proceeds of the Palidor Check, because he was not the tenant under the lease. **RB**, at pp. 8-10. They argue that only Nancy Taylor can have a claim because she was the tenant who was locked out, and because they made

² The Locksmith Respondents do not address the standard of review other than to say they "agree that the correct standard for review is the abuse of discretion standard for the reasons set fourth (sic) in the brief of the other respondents." [Locksmith Respondents' Brief, at p.4]. A party waives an issue by failing to either brief or argue it, so the Locksmith Respondents should be determined to have conceded this issue as well.

demands for payment of her back rent to her. Id. at p. 15. But Fred Palidor is not seeking to enforce rights under the lease—either the possessory or contractual rights the respondents violated by trespassing on the leasehold, changing the locks, and locking out Ms. Taylor. Fred Palidor has brought three claims for the injuries he suffered arising out of his payment of \$10,000 made under respondents’ duress—claims in restitution, civil conspiracy, and under the Consumer Protection Act (“CPA”). He is the real party in interest for each of those claims. That he is not the real party in interest for claims he has not brought is not relevant to this appeal.

C. Respondents’ Arguments on Restitution are not Supported by the Law or the Facts.

Respondents make two arguments to support their theory that Fred Palidor is not a real party in interest for the restitution/unjust enrichment claim³: (1) Fred Palidor didn’t pay money directly to respondents; and (2) respondents made no threats or demands to Palidor. **RB** at p. 10. The first argument is directly contrary to established Washington law. The second argument is factually erroneous and legally irrelevant.

³ In an attempt to minimize confusion, appellant will refer to restitution and unjust enrichment collectively as “restitution”, unless the context dictates otherwise.

1. Privity is not Required to Sustain a Claim in Restitution.

The case law could not be more clear: there is no requirement of privity to bring a claim for unjust enrichment. This proposition and supporting authorities were cited in Fred Palidor's opening brief. Respondents do not dispute the authority, but advance two arguments in an attempt to avoid its clear implications. Neither of the arguments withstand analysis.

a. The Benefit in a Restitution Claim does not need to Come Directly from the Plaintiff.

Respondents argue that the first "element" of a claim in restitution is "a benefit conferred upon the defendant by the plaintiff." **RB** at p. 11. Respondents argue that plaintiff did not confer a benefit upon the Flaxes or enrich them, because he made the check payable to Dream On Futon, thereby conferring a benefit on Nancy Taylor.⁴ This is simply respondents' attempt to introduce a requirement of privity into a restitution claim. That is contrary to settled Washington law.

⁴ Respondents do not explain this non-sequitur. Nor do they explain why, if delivering a check payable to Dream On Futon could be said to confer a benefit on Ms. Taylor, it cannot be said to confer a benefit on the Flax Respondents, who were, after all, both the intended and actual recipients of the proceeds of the check.

As stated in Davenport v. Washington Ed. Ass'n, 147 Wn.App. 704, 728, 197 P.3d 686 (2008), “unjust enrichment is quite difficult to define.” The 3 element definition relied upon by respondents is “unhelpful and can lead to serious errors.” Restatement (Third) of Restitution and Unjust Enrichment (2010), §1, cmt. d, at p.8.

Nevertheless, to the extent the first “element” of a restitution claim applies to any claim in restitution, a plaintiff does not need to give a benefit directly to the defendant to be entitled to recover in restitution. This is undisputable under Washington law, the Restatement (Third) of Restitution and Unjust Enrichment, and every legal iteration of restitution and unjust enrichment theory of which appellant is aware.

None of the payments made in the privity cases cited in Fred Palidor’s Opening Brief (p. 13)⁵ were made directly to the defendants. Moreover, there is nothing indicating they were made with the intention of payment to the defendants, as is the case here. Also, as is discussed below, the rules in restitution make clear that benefits can be pursued through multiple transactions, until one encounters a bona fide payee.

⁵ Pacific Coal & Lumber Co. v. Pierce County, 133 Wash. 278, 233 P. 953 (Wash. 1925); Soderberg v. King County, 15 Wash. 194, 45 P. 785 (1886); Fidelity Nat. Bank of Spokane v. Henley et al., 24 Wash. 1, 63 P. 1119 (1901)

Those payments were not made directly to the defendants in those cases, moreover, they were not made with the intention of payment to the defendants. To the extent it makes any sense to use the three element definition of unjust enrichment in all restitution claims, the definition can only be squared with existing authority by understanding that the benefit need not be provided directly by the plaintiff to the defendant.

b. Respondents' Attempt to Factually Distinguish the Privity Cases Fails.

Respondents argue that the privity cases are distinguishable on their facts, stating “in all of these cases and authorities, a third party wrongfully obtained or coerced from the plaintiff and then gave it to the defendant, who had knowledge of the coercion or wrong. Thus these authorities are only applicable if Taylor coerced or wrongfully obtained the \$10,000 from Palidor and then gave the money to the Respondents.” Respondents argument is obviously wrong, and not just because Nancy Taylor was not a party to any transaction involving the Palidor Check.

Respondents' position is contrary to their own cited authority. A transaction is voidable even where coercion is exercised by someone not a party to the transaction. **RB**, p.13, citing Restatement (Second) Contracts §175(2) (1981). Therefore, if Fred Palidor's provision of the

Palidor Check was induced by respondents' coercion (a fact that no reasonable person could dispute, as addressed below) the only questions left to resolve are whether the funds are traceable and whether respondents might be bona fide payees. Each of these are utterly indisputable. The funds went directly from Fred Palidor's account to the Flax's. Tracing is not an issue. Respondents knew of the circumstances giving rise to the duress, and/or participated in the same, so there is no question of their being a bona fide payee or good faith transferee. Restatement (Third) of Restitution and Unjust Enrichment, (2010), §67; 28 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts §71:17 (4th Ed. 2003); Restatement (Second) Contracts §175(2) (1981).

Respondents repeatedly mistake facts of a case for elements of the claims considered. None of the cases cited come remotely close to holding that privity is required for a claim in restitution under any circumstances, or that recovery in restitution is limited to factual circumstances identical to those of the particular case. The cases in restitution suggest that just the opposite is true, that restitution is flexible in order to respond to the equities of a given case.

2. Respondents Directly Coerced Fred Palidor's Payment.

Respondents argue that "Palidor has no claim in restitution because he was not threatened, coerced, or subjected to duress by the Respondents." **RB**, p. 14. That's simply wrong. Respondents communicated their threats, express and implied, directly to Fred Palidor. Moreover, even threats communicated indirectly can provide the basis for a claim in restitution.

Fred Palidor stated in his declaration that Hovde told both him and Nancy that they wouldn't allow Nancy or her business back on the premises without payment. **CP** 15. Palidor negotiated directly with David Hovde, who has admitted understanding that the funds they were negotiating for were Palidor's. **CP** 19. The facts are clear that they communicated the threat to Fred Palidor, with full understanding and expectation that they would be receiving his funds in response to those threats.

Respondents were not merely threatening unlawful conduct against Palidor's wife, in itself enough to constitute coercion, they were *carrying out* the unlawful conduct in Fred Palidor's presence, and he was witness to the emotional effect their conduct was having on his wife. **CP** 14-15. This is also sufficient communication of a threat to constitute coercion, as is recognized by the authorities cited by respondents. "The threat may be expressed in words or it may be

inferred from words or other conduct...Thus if one person strikes or imprisons another, the conduct may amount to duress because of the threat of further blows or continued imprisonment that is implied.” Restatement (Second) of Contracts, §175, *comment a*. Here the threat was expressed in words *and* implied in conduct, all in Fred Palidor’s presence, all while respondents were knowingly negotiating to get as much of Palidor’s funds as possible. Exactly what would Respondents’ have to do, in their eyes, to be considered to have made threats *TO* Fred Palidor?

3. Threats Communicated Indirectly May Establish a Claim in Restitution.

Respondents’ argument that they did not communicate threats directly to Fred Palidor is not only factually wrong, it’s legally irrelevant. They cite no authority for their imagined rule of law, that threats must be communicated directly to a person for there to be a claim in restitution. Their proposed law is directly contrary to the very treatises they cite. “Threats communicated through another have the same effect as if made directly to the person coerced.” Williston on Contracts, § 71:17, p.496; see also Stevens v. Thissell, 240 Mass. 541, 134 N.E. 398 (1922) (fact of no direct communication from party making threats to coerced party immaterial).

4. The Authorities Cited by Respondents Support Palidor's Restitution Claims.

Respondents also cite to Williston on Contracts, the Restatement (Third) of Restitution, and the Restatement (Second) of Contracts for numerous general principles concerning restitution and duress. **RB**, at p.13. What is not clear is why Respondents believe those principles support their position rather than Fred Palidor's.

"If the plaintiff's assent is induced by a third party, the assent is voidable by the plaintiff unless the defendant acted in good faith and without knowledge of the duress." **RB**, at p.13, *citing* Restatement (Second) Contracts § 175(2) (1981). Fred Palidor's assent to his transfer of funds was induced by respondents and their coercive conduct. Dream On Futon, Ms. Taylor, and each of the Respondents either knew of the duress or did not act in good faith or both. The principle supports Fred Palidor's claim.

"[A] claimant entitled to restitution from property may obtain restitution from any traceable product of that property" and "against any subsequent transferee who is not a bona fide purchaser". **RB** at p. 13, *citing* Restatement (Third) of Restitution and Unjust Enrichment § 58(1)-(2) (2011). It is impossible to imagine property more traceable than the proceeds from the Palidor Check. The funds went directly from Palidor's bank account to the Flaxes'. Not even respondents can

contend that they were bona fide payees. Again, the principle cited supports Palidor's claim.

Respondents fail on both counts: they were both actively engaged in wrongful conduct and had knowledge of the duress that resulted in the transfer of funds to them. There is no basis on which they could be found to be a bona fide payee. The authority cited supports Fred Palidor's claim to the funds, not respondents'.

The simple application of the principles from the cases and treatises cited make clear: however the transaction involving the Palidor Check is analyzed, every part of it was induced by respondents' unlawful conduct. In fact, it is a quintessential unjust enrichment claim: respondents hold property that they cannot in good conscience keep from Fred Palidor. The Court should do justice and direct the trial court to return the funds to Fred Palidor.

D. Respondents Err in Their Analysis of Fred Palidor's Consumer Protection Act Claim.

Respondents' arguments concerning the Consumer Protection Act require little discussion. They do not base their argument on the holding of any case law, but simply argue that any unfair and deceptive act was done to Taylor, not Palidor. **RB**, p. 18. Their argument is based on erroneous characterizations of the facts and

misapplication of settled law. They argue that the unfair or deceptive act was done to Taylor, not Palidor, and as a result he has no claim. This argument is factually and legally infirm.

As is set forth above, respondents' unfair and deceptive acts were exercised against Fred Palidor directly. Palidor was directly induced by the unlawful coercion against his wife, with threats stated and carried out in his presence, to provide the cashier's check that was deposited directly into the Flax's account. Respondents knew that Palidor was paying the funds out of his own personal funds and only because of their unlawful duress. Moreover, the Flax Respondents' agent, David Hovde, directly lied to Fred Palidor about what the policeman said while negotiating the payment from Fred Palidor.

What respondents attempt to do is reargue positions repeatedly rejected by the Washington courts. The only authority they cite is Panag v. Farmers Ins. Co. of Washington, 166 Wn.2d 27, 39, 204 P.3d 885 (2009). Frankly, it is a curious case for respondents to rest their defense on, given that it rejects most of the positions respondents advance, and stresses the liberal interpretation the courts are required to provide the CPA. "A plaintiff bringing a CPA action can serve the goal of protecting the public regardless of whether that person is a consumer or in a business relationship with the actor. The express purposes of the act do not mandate that the plaintiff must be a consumer or

in a business relationship with the alleged violator.” Panag, p. 40. The CPA is to be liberally construed to effect its purposes. Id. A plaintiff must simply establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury. Panag, at p.59.

Respondents’ argument that a CPA claim requires that “the defendant must have done an unfair or deceptive act against the plaintiff that injures the plaintiff” **RB** at p.18 seeks to add a sixth element to a CPA claim. The courts have repeatedly rejected attempts to add additional elements to CPA claims. See Panag, at 38 (no separate standing requirement, or need for privity in claims brought under the CPA; Holiday Resort Cmty. Ass'n v. Echo Lake Assocs., 134 Wn.App. 210, 135 P.3d 499 (2006) (mobile home tenants may sue distributor of unfair form lease agreement, notwithstanding lack of privity). “A ‘successful plaintiff’ is defined exclusively as ‘one who establishes all five elements of a private CPA action.’” Panag, 166 Wash.2d at 38. The Washington courts have repeatedly rejected attempts to add additional elements, and should do so again here.

E. Respondents' Arguments Against Fred Palidor's Civil Conspiracy Claim Fail.

Respondents argue that Palidor is not the real party in interest for a claim of civil conspiracy. Respondents do not actually claim that Palidor does not establish the elements of a civil conspiracy claim, instead they seek to add a third element—one not identified or followed in either Wilson v. State, 84 Wn.App. 332, 929 P.2d 448 (1996) or Newton Insurance Agency v. Caledonian Insurance Group, 114 Wn.App. 151, 52 P.2d 30 (2002). They argue that because the unlawful conspiracy was targeted at Nancy Taylor, not him, he cannot have a claim. **RB**, at p. 19. This proposition is factually inaccurate, as respondents targeted Palidor as well as Taylor. It is also legally unsupported, as respondents do not cite any authority that actually holds this to be the case. The idea that someone damaged by an unlawful conspiracy has no claim unless the conspirators intended to damage them is counter-intuitive to say the least. Without legal authority to support such a proposition, the court should reject such a rule out of hand.

Respondents do not dispute that their agreement to trespass on and lock out Nancy Taylor and her business from the premises was illegal and coercive. They do not dispute that while conducting this

conspiracy they negotiated payment directly from Fred Palidor, knowing that they were negotiating payment from his personal funds. To say that this action was not conducted against Fred Palidor, and to argue that he was not damaged by it, is to argue a wish, not the law.

F. Respondents Have Provided No Grounds Upon Which to Uphold the Dismissal of the Action Under CR 17(a).

Respondents make 2 arguments in trying to persuade the court that dismissal was appropriate: (1) a reasonable time to add the real party in interest need only be provided where an excusable mistake was made; and (2) the court allowed Fred Palidor a reasonable time, because he could have sought to substitute Nancy Taylor in the 28 days after they noted the hearing. Neither of these contentions is an accurate reflection of Washington law.

1. CR 17(a) Requires that a Reasonable Time be Granted for Substitution, Ratification, or Joinder.

There is no question that CR 17(a) forbids dismissal of the action until the court allows plaintiff a reasonable time to substitute, join, or obtain ratification of the real party in interest. Respondents cite Beal v. City of Seattle, 134 Wn.2d 769, 778, 954 P.2d 237 (1998) for the proposition that where identification of the real party in interest is not difficult, and no excusable mistake has been made, a court need not allow additional time for the real party in interest to ratify, join, or substitute in the action. **RB**, p. 22. While the citation is

an accurate representation of the authority that the court discusses at that page, Respondents fail to recognize that the Beal court was reviewing existing authority on the question, but went on to *reject* that rule. The court also considered, and adopted the reasoning of, authorities criticizing application of the “inexcusable neglect” or “honest mistake” standard where the proposed amendment of the complaint involves a change in representative capacity in which the suit is brought and the defendant is not prejudiced by the amendment. This is so even where no actual mistake was made, but affirmative misconduct by the plaintiff.

In Beal, the plaintiff’s attorney knew who the real party in interest was at the time of the filing of the action, conceded the question was an easy one, named a different party because of an inability to obtain consent of the real party in interest before the statute of limitations expired, amended the action in an inappropriate *ex parte* proceeding, and initially lied to the court about his actions. The Beal court nevertheless reversed the trial court and the Court of Appeals, ruling that application of the “inexcusable neglect” or “honest mistake” standard to the facts of that case would undermine the purposes of civil rules 15(c) and 17(a).

It is still unclear what purpose was served by dismissing the case, rather than allowing time to seek the joinder, ratification, or

substitution of whichever party the trial court believed constituted the real party in interest. One of the purposes of CR 17(a)—expediting litigation—was thwarted by the dismissal, and as is discussed below, the other purpose of CR 17(a)—allowing the defendant to avoid double recovery—was not Respondents’ goal at all, and would have been served by allowing respondents to join or obtain the ratification of the “real” party in interest. It also would have spared Fred Palidor the necessity of bringing this immediate appeal or risk losing his claim for the return of his money.

Respondents assert that the decision whether to dismiss the case or allow the real party in interest to substitute, join, or ratify an action is in the discretion of the trial court, citing Sprague v. Sysco Corp., 97 Wn.App. 169 (1999). It is clear that any discretion the trial court has must be exercised in light of the language and policies of the rule, which strongly disfavor dismissal. The purpose of the rule is not to punish dilatory plaintiffs, but to avoid double recovery against defendants. The rule expressly states no action shall be dismissed on these grounds until a reasonable time has been allowed after objection to join, substitute or obtain ratification from the real party in interest. The Beal court reversed the trial court’s dismissal under CR 17(a) despite intentional misconduct by the attorney—clearly the policies

and language of the rule mean that absent extraordinary circumstances, the court should not dismiss a case.

Accordingly, the Sprague court found that the trial court abused its discretion in not allowing the substitution of the bankruptcy trustee as the real party in interest, because the defendant would not be prejudiced by the substitution, and the only change would be who would benefit from the action. Id. Following Sprague, then, the court should have allowed plaintiff time to substitute, join, or obtain ratification of the existing litigation. Respondents obviously would not be prejudiced by the substitution, joinder, or ratification in this case—particularly if the court were to accept its contention that Nancy Taylor was the real party in interest, which is the result they desire.

Fred Palidor contested the claim that he was not the real party in interest, but 9 days prior to the hearing asked the court to be allowed to effect the ratification, substitution, or joinder of the real party in interest if the court disagreed. Whatever standard of review the court applies, it is clear that the trial court's determination must be reversed.

G. Respondents have Presented No Coherent Grounds in Which Nancy Taylor, or the Bankruptcy Trustee, can be said to have a Claim Against them for the Palidor Check or its Proceeds.

Throughout their brief, respondents assert that Nancy Taylor is the party with a claim against them for a return of the proceeds of the Palidor check, but they also assert that she has no actual right to recover the funds, on various legal theories. They also repeatedly make the erroneous claim that Nancy Taylor paid the \$10,000 Palidor Check to them.

It is undisputed that the only reason Fred Palidor made his cashier's check payable to Dream On Futon was to be sure that the check was properly recognized as a rent payment. The reality of the situation is clear, whatever the formalism of the transactions—Fred Palidor paid \$10,000 to respondents in order to stop the illegal coercion against his wife. If, however, one is to exalt form over substance, then one can argue that Fred Palidor either loaned or simply paid the funds to Dream On Futon (albeit due to respondents' duress and for the explicit purpose that the funds be paid to the Flaxes), and Dream On Futon paid the funds to respondents. The actual funds, of course, went directly from Fred Palidor's account to the Flax Respondents account, just as intended. The Palidor Check was never made payable to Nancy Taylor, and the funds were never deposited in her account.

Respondents argue that it was not difficult to determine that Taylor was the real party in interest because she was the tenant, was

behind on rent, was locked out of the property, and respondents made demands to her to pay the back rent. **RB**, at p.23. But none of this has anything to do with who paid the funds contained in the Palidor Check and is entitled to their return. In the illustration cited by respondents from the Restatement of Restitution and Unjust Enrichment, the mother of the embezzling employee is entitled to return of the funds she paid in response to the Employer's threat of criminal prosecution, but the employee is not. **RB**, at 16, citing Restatement of Restitution and Unjust Enrichment, §14, cmt. d, illus. 1 (2011). In the companion illustration, it is made clear that the employee has no claim in unjust enrichment for payment coerced by Employer that are less than the amounts owed on the underlying obligation. Id., illus. 2. In other words, Nancy Taylor has no claim in unjust enrichment against respondents, whatever other claims she may have. If she does not have a claim in unjust enrichment, how can she be the real party in interest on the claim?

To be certain that respondents would credit the payment to rent, Palidor made the check payable to Dream On Futon. As pointed out in Fred Palidor's Opening Brief, respondents have never pleaded or alleged facts on which Dream On Futon's corporate veil might be pierced. They are separate legal entities, with separate assets and separate creditors. Nancy Taylor did sign the check over to the Flaxes,

but as the only officer of Dream On Futon, she was the only person who could. CP 11. Other than that they like their chances better against Nancy Taylor, what is their basis for arguing that the claim for the return of these funds belongs to Nancy Taylor and not Dream On Futon's? If Fred Palidor is not the real party in interest for the claims to recover the funds from the Palidor Check, the only party whom it could be is Dream On Futon.

There is no question why Respondents want to urge Nancy Taylor as the real party in interest. They believe they will be able to defeat a claim brought by Ms. Taylor, by one or more of their legal theories. On the other hand, they have no reasonable hope of defeating claims brought by Fred Palidor or Dream On Futon. In short, they are asking this Court to ignore established law in order to consecrate their retention of their illegally obtained \$10,000.00. Granting that request would insure further efforts at self-help eviction and creative efforts to retain its benefits.

H. The Court Should Disregard the Locksmith Respondents' Brief.

The Locksmith Respondents' brief contains very little legal authority, and is replete with unsupported factual assertions without citations to the record, contrary to RAP 10.3(a). The court should disregard all the matter in the brief that is not properly cited to the record, which leaves very little to address. The only citation to the

record the Locksmith Respondents do include mischaracterizes the cited facts. They claim that Fred Palidor and Nancy Taylor both characterized the payment of the Palidor Check as a loan from Palidor to Taylor. Locksmith Respondents' Brief, p.3. A review of the declarations demonstrates that is not accurate.

First of all, the context of the quoted statements in both declarations is not referring to the transaction where Fred Palidor delivered his \$10,000 check to David Hovde, but the contemplation of their response to being told by Hovde the night before that he had locked Nancy Taylor and Dream On Futon out of the business. Fred Palidor's statement is that he had never provided "financial support to Nancy or her business previously." CP 14. It does not characterize his potential payment as a loan, and certainly not a loan to Nancy Taylor as opposed to her business. Similarly, Nancy Taylor does not characterize the possible payment as a loan to her as opposed to her business. CP 12.

Under the authority presented in this appeal it is clear that Fred Palidor has a right to recover his payment however it is characterized, and whether that payment is considered to have been made to respondents, Nancy Taylor or her business. The distinction is, however, critical for respondents' theory. By mischaracterizing the transactions as a personal loan to Nancy Taylor, they are attempting

to bolster their claim that she is the sole real party in interest. It is not consistent with the undisputable facts.

Beyond that, the Locksmith Respondents' brief basically amounts to repeated claims that there was no privity between them and Fred Palidor or Nancy Taylor. It may be true that they never met face to face, but Fred Palidor and Nancy Taylor had a most unpleasant and expensive encounter with the Locksmith Respondents' handiwork. If trespassing and assisting in the unlawful eviction of a tenant is indeed "routine" for them, as depicted in their brief, Palidor's ability to advance his CPA claim is particularly important.

I. Respondents' Request for Fees Cannot be Sustained.

Respondents request attorney's fees pursuant to RAP 18.9(a), claiming Fred Palidor's appeal is frivolous. An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and the appeal is so devoid of merit that there is no possibility of reversal. Advocates for Responsible Development v. Western Washington Growth Management Hearings Board, 170 Wn.2d 577, 580 (2010). All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant. Id. Raising at least one debatable issue precludes finding that the appeal as a whole is frivolous. Id.

Respondents' request is based on the theory that Palidor's claim that he was subjected to duress is a misstatement of the record, **RB** p.26, and the authorities cited have no bearing on the case. Respondents claim that the authorities cited show that Palidor could only have a claim if Taylor exercised duress on Palidor. The authorities cited of course demonstrate nothing of the sort, as is addressed above. Furthermore, the claim that there is no evidence in the record that respondents made any threats to Palidor about Taylor is simply wrong. CP 15, *supra*, pp. 7-8.

Finally, respondents do not even attempt to argue that the appeal with respect to the proper procedure on a CR 17(a) motion is frivolous. As such, they have not even asserted that no debatable issues were raised in this appeal. Established Washington law thus precludes an award of fees under RAP 18.9(a).

J. Fred Palidor is Entitled to an Award of Fees for this Appeal Under the CPA.

Respondents are correct that Fred Palidor is not entitled to an award of fees under the CPA until he has been adjudicated to be a successful plaintiff on the claim. Appellant believes that the undisputed facts on the record establish that he is entitled to a judgment under the CPA, and this Court could so decide on this appeal. Absent such a determination, however, Fred Palidor requests

that the court rule that Fred Palidor's right to attorney's fees, if successful on the CPA claim at the trial court, includes all fees and costs incurred on this appeal.

III. CONCLUSION

For the reasons stated above, Fred Palidor requests that the Court reverse the decision of the trial court dismissing his complaint, award plaintiff his attorney's fees incurred in bringing this appeal, and remand to the Superior Court to direct that judgment be entered in favor of Fred Palidor on each of his claims and, or in the alternative, for further proceedings consistent with the Court's decision.

Respectfully submitted,

SEYMOUR LAW OFFICE, P.S.



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CERTIFICATE OF SERVICE

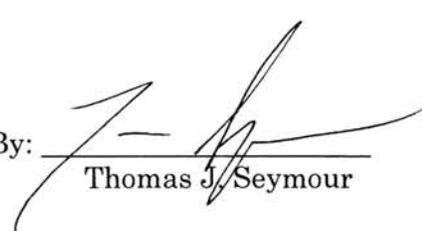
I certify that on the 26th day of July, 2012, I caused a true and correct copy of this Reply Brief to be served on the following by U.S. Mail:

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