No. 90830-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In the Matter of the Estate of

MARGARET L. PERTHOU-TAYLOR,

Deceased,

ALISON PERTHOU,

Petitioner/Appellant,

v.

CORNELIA PERTHOU MacCONNEL, Individually and as Executrix and Notice Agent for the Estate of Margaret L. Perthou-Taylor,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

There is no basis for the Supreme Court to accept review of the Court of Appeal's decision affirming the trial court's dismissal of Alison Perthou's claim against Cornelia MacConnel alleging that she wrongfully interfered with her expectancy of a gift. Ms. Perthou's claim, brought thirty years after her former mother-in-law allegedly promised to fund a retirement fund for her benefit, and seven years after her former mother-in-law died, is based solely on a 1982 letter allegedly written by her former mother-in-law, in which she purported to agree to fund a retirement account for Ms. Perthou. The Court of Appeals correctly concluded that even if they recognized the tort of intentional interference with inheritance or gift, "Perthou's evidence does not create any genuine issue of material fact for trial." Opinion, p. 13.

Contrary to Ms. Perthou's assertions, the Court of Appeals did not decline to recognize tortious interference with a testamentary expectancy. Rather, the Court of Appeals found that Ms. "Perthou fail[ed] to sustain her burden to withstand dismissal" because she failed to satisfy the requisite elements of a claim for tortious interference with inheritance or gift. Opinion, p. 10. Because Ms. Perthou had no evidence to support her claim, the Court of Appeals explicitly declined to express an "opinion on whether the tort should be recognized based on other facts." *Id.*

Review by the Supreme Court under RAP 13.4(b) is not warranted. None of the cases Ms. Perthou cites as a basis for review under RAP 13.4(b)(1) and (2) are in conflict with the Court of Appeals' decision.

Moreover, recognition of tortious interference with an expectancy of inheritance is not a fundamental or urgent issue of broad public import. Even if recognizing the tort was an important public issue, this is not the proper case to recognize the tort because, as the Court of Appeals found, Ms. Perthou's unsubstantiated allegations, based on nothing more than her "information and belief...failed to meet her burden to withstand dismissal under the elements she articulated." Opinion, p. 16.

II. COUNTERSTATEMENT OF THE CASE

Ms. Perthou's entire case is based on her purported "information and belief" that Ms. MacConnel dissolved an alleged retirement account, of which Ms. MacConnel had no knowledge. The only evidence Ms. Perthou offered is a letter allegedly written in 1982 in which Ms. Perthou "infers" that her former mother-in-law ("Margaret") intended to give her money. Based on several declarations in support of Ms. MacConnel's motion to dismiss, the Court of Appeals concluded that there was no evidence that Margaret ever created or funded an account of any kind for Ms. Perthou. Opinion, p. 12.

Margaret's meticulous check registers, dating back to 1980, demonstrate that she wrote checks to pay for club dues for Ms. Perthou and gave her and Ms. Perthou's children Christmas and birthday gifts. CP 260, 366. But there are no checks to an account for her benefit. CP 260, 366-67. Margaret created a Trust in 1996 and the records documenting the transfer of her assets into the Trust demonstrate there is no record of any account for Ms. Perthou. CP 366-67, CP 408-33. Margaret's tax returns

are likewise silent as to any gifts to Ms. Perthou or an account for her benefit. CP 366. Two accountants worked with Margaret from 1986 until her death in 2005 and neither have any knowledge about an account for Ms. Perthou's benefit. CP 380-84. From 1986-2002, one accountant prepared Margaret's income tax returns, gift tax returns, and handled numerous financial matters for Margaret and has no knowledge about any account for Ms. Perthou. CP 382-84. The accountant who worked with Margaret from 2002 until her death similarly never received any information about an account for the benefit of Ms. Perthou. CP 380-81. Likewise, Margaret's financial advisor has no knowledge about an account for Ms. Perthou's benefit. CP 373-74.

During the 20-year period between 1982 and 2002, Margaret handled her own financial affairs without assistance from her daughter, Ms. MacConnel. CP 374, 383. Beginning in 2002, Ms. MacConnel was co-trustee of her mother's Trust and served as trustee of the Trust after her death in 2005. CP 367. Ms. MacConnel never saw any documentation regarding an account for Ms. Perthou's benefit. CP 367. Margaret's Will and Trust, which were executed in 2002, demonstrate that Margaret did not make any bequest to Ms. Perthou. CP 336-42, 408-33. Margaret's accountant assisted with post-death tax matters for Margaret and found no account in Ms. Perthou's name, payable at death to Ms. Perthou, or held in joint tenancy with Ms. Perthou. CP 380.

Because Ms. Perthou failed to present any evidence in support of her claim of a gift under any legal or equitable theory, even a claim of

tortious interference with a testamentary expectancy or gift, the probate court properly dismissed the claims on a CR 12(b)(6) motion. Discontent with the probate court's decision, Ms. Perthou sought revision in the trial court. The trial court reviewed extensive briefing by Ms. Perthou and denied her motion for revision and affirmed the commissioner's order. Ms. Perthou then moved for reconsideration of the trial court's decision, which was again denied. Ms. Perthou then sought direct review by the Supreme Court pursuant to RAP 4.2(a), which this Court denied. By the time the Court of Appeals rendered its decision, Ms. Perthou's claim had been reviewed by a court four different occasions, all of which reached the same conclusion.

III. ARGUMENT

A. Recognition of Tortious Interference with a Gift Is Not an Issue of Substantial Public Interest.

The Court of Appeals specifically addressed Ms. Perthou's argument that "the need to recognize this tort is 'obvious and acute' and that recognition 'will foster important public policy'" and concluded that "neither assertion is persuasive in this case." Opinion, p. 15. Citing *Beckwith v. Dahl*, 205 Cal. App.4th 1039, 141 Cal.Rptr.3d 142 (2012), the Court of Appeals discussed "several policy considerations that recognition of the tort would bring." Opinion, p. 7. The Court of Appeals also cited *Hadley v. Cowan*, 60 Wn. App. 433, 804 P.2d 1271 (1991), which "expressed concerns similar to those stated in *Beckwith*—the effect

on the probate statutes if a tort is recognized outside the statutory framework." Opinion, p. 8.[1] The Court of Appeals found that "even if [it] were to ignore the serious policy considerations that both *Beckwith* and *Hadley* identify and recognize the tort,...Perthou does not show that recognition of the tort is necessary to afford her a remedy." Opinion p. 10 and 16.

B. The Court of Appeals Correctly Concluded that Ms. Perthou Failed to Meet Her Burden to Withstand Dismissal Under the Elements She Articulated.

The Court of Appeals did not ignore the cases from other jurisdictions that recognize tortious interference with a testamentary expectancy or gift, as Ms. Perthou contends. In fact, the Court of Appeals carefully applied the facts presented by Ms. Perthou to the five elements followed by "most states recognizing the tort" and articulated by Ms. Perthou. Opinion, p. 9. Based on this analysis, the Court of Appeals determined that Ms. Perthou failed to satisfy the requisite elements of a claim for tortious interference with a gift.

Specifically, the Court of Appeals found that Ms. Perthou failed to show: (1) "that Ms. MacConnel had the requisite knowledge of the alleged gift or that she intentionally interfered with it;" (2) "that proof amounting to a reasonable degree that the bequest or devise would have been in effect

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[1] In *Hadley*, the court indicated that even if the tort were recognized, the probate court would have jurisdiction to hear it and ruled that res judicata precludes such an action when issues involving the same nucleus of operative facts can and should be settled in the probate court. *Id.* at 439.

at the time of the death of the testator if there had been no such interference;" and that "MacConnel directed any tortious conduct at someone other than Perthou, which the tort requires." Opinion, p. 12. The Court of Appeals observed that "allegations alone are insufficient in the context of this motion. Evidence is required," and concluded that "Perthou's evidence does not create any genuine issue of material fact for trial." Opinion, p. 12-13.

C. The Court of Appeals' Decision Is Not in Conflict with Any Supreme Court or Court of Appeals Decisions.

Contrary to Ms. Perthou's contention, the Court of Appeals' decision is not in conflict with this Court's decision in *Melville v. State*, 115 Wn.2d 34, 793 P.2d 952 (1990) because *Melville* is easily distinguished from the present case. In *Melville*, plaintiff alleged extensive facts based upon an affidavit by his lawyer, who stated that he read various records, files, reports and depositions, which he asserted were accurate. *Id.* at 36. Because the source documents from which the lawyer drew his facts were not in the record, the Court concluded that the affidavit did not meet the requirement of CR 56(c). *Id.*

As the Court of Appeals observed in this case, unlike *Melville*, the failure to attach documents to Ms. MacConnel's declaration had "little or no impact on the evidence in the declaration," which "essentially denied any knowledge of the claimed fund and further detailed what steps Ms. MacConnel took to investigate Margaret's records to determine whether there was any evidence of such a fund." Opinion, p. 14-15.

Likewise, the Court of Appeals rejected Ms. Perthou's hearsay objection. Opinion, p. 15. Ms. Perthou cites *Dunlap v. Wayne*, 105 Wn.2d 529, 716 P.2d 842 (1986) for the proposition that a court cannot consider inadmissible evidence when ruling on a motion for summary judgment. Again, this case is distinguishable from and not inconsistent with *Dunlap*. In *Dunlap*, plaintiff's only evidence to support his claim for defamation was his and his wife's description of their conversation with the plaintiff's employer. This Court concluded that plaintiff could not use his employer's out-of-court statements to prove that the defendant made a defamatory statement.

Here, Ms. MacConnel's declaration was not the only evidence the court considered. As the Court of Appeals noted, even if it was erroneous not to strike Ms. MacConnel's declaration, "the other unchallenged declarations provide evidence that the alleged fund never existed." Opinion, p. 15.

Ms. Perthou complains that "those declarations do not resolve all the issues of material fact as to the existence of the account." Petition for Review, p. 12. However, the Court of Appeals determined that the "declarations from accountants and a financial advisor that handled Margaret's accounting, personal tax, and trust account matters show that none of these individuals recall Margaret mentioning Perthou or setting up an account for Perthou's benefit." Opinion, p. 11

Ms. Perthou also cites to *Felsman v. Kessler*, 2 Wn. App. 493, 469 P.2d 691 (1970) and *Riley v. Andres*, 107 Wn. App. 391, 27 P.3d 618

(2001) for the proposition that when material facts in an affidavit are particularly within the knowledge of the moving party, the case should proceed to trial so that the opponent can disprove such facts by cross-examination. Again, the facts in those cases are easily distinguishable from the present case. In both *Felsman* and *Riley*, there was evidence that contradicted the moving party's affidavits, which precluded summary judgment. Here, Ms. Perthou presented no contradictory evidence. As the Court of Appeals recognized, "allegations alone are insufficient in the context of this motion. Evidence is required. And Perthou's evidence does not create any genuine issue of material fact for trial." Opinion, p. 12-13. In fact, the Court of Appeals reasoned that "the cases on which Perthou relies to assert that cross-examination should have been allowed here do not establish a uniform rule for further discovery. If that were the case, the court could never grant summary judgment on the basis of declarations." Opinion, p. 14. The Court of Appeals emphasized that is not the law. *Id.*

Ms. Perthou cites to *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 20 P.3d 447 (2001), for her assertion that it was error not to allow her to conduct discovery. Petition for Review, p. 14. But *Demelash* has no relevance to this case. The plaintiff in *Demelash* brought an action against a store for false arrest, conversion, and assault and battery after being detained by the store on suspicion of shoplifting, which was dismissed on summary judgment. On appeal, plaintiff contended that the trial court erred in failing to compel the store to produce discovery

regarding its security activities, which the defendant store claimed was protected under the attorney work product doctrine. *Id.* at 509. The Court of Appeals agreed that the plaintiff was entitled to information regarding the store's conduct in other shoplifting incidents to establish his CPA claim. Here, Ms. Perthou never even identified what discovery she should have been allowed to conduct or how that discovery would support her claim.

The Court of Appeal's decision is also consistent with *Marriage of Moody*, 137 Wn.2d 979, 992 P.2d 1240 (1999). In *Moody*, this Court recognized that "[i]n an appropriate case the superior court may determine that a remand to the commissioner for further proceedings is necessary." *Id.* The *Moody* Court, however, did not remand the case to the commissioner, but held that the superior court judge correctly refused to consider new evidence offered on the motion for revision. *Id.* at 993.

Likewise, the Court of Appeals held that Ms. Perthou "failed to meet her burden to withstand dismissal under the elements she articulated" and "provided no relevant authority on appeal to support her assertion that the appropriate course of action was to remand the case to the commissioner." Opinion, p. 16.

IV. CONCLUSION

Ms. Perthou failed to plead or cite a single act by Ms. MacConnel that would support a claim against her. Just as this Court denied Ms. Perthou's request for direct review of her appeal, the Supreme Court should not accept review of the Court of Appeals' well-reasoned opinion.

Review is not warranted under RAP 13.4(b)(1) or (2) because the Court of Appeals' decision is not in conflict with any decision by the Supreme Court or the Court of Appeals. Nor is there an issue of substantial public interest that merits further review under RAP 13.4(b)(4).

RESPECTFULLY SUBMITTED this 31st day of October, 2014.

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CERTIFICATE OF SERVICE

I, Susan Cartozian, hereby certify that on October 31, 2014, I served a copy of the foregoing document (*Respondent's Answer to Petition for Review*) on the parties listed below in the manner shown:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 31st day of October, 2014.

Susan Cartozian

Susan Cartozian, Paralegal

OFFICE RECEPTIONIST, CLERK

To: Susan Cartozian
Cc: Mark G. Olson (mark@mgolsonlaw.com); Christopher M. Constantine (ofcounsl1 @mindspring.com); Gregory G. Rockwell (grocket@msn.com); Karen Bertram
Subject: RE: Estate of Margaret L. Perthou-Taylor; Alison Perthou v. Cornelia Perthou MacConnel; No. 90830-3.

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Supreme Court Clerk's Office

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Re: In the Matter of the Estate of Margaret L. Perthou-Taylor; Alison Perthou v. Cornelia Perthou MacConnel
Washington Supreme Court No.: 90830-3
Filed by: Karen R. Bertram, WSBA No. 22051, Attorneys for Respondent Cornelia Perthou MacConnel

Dear Clerk:

Per Karen Bertram's request, I am attaching the following documents for filing today with the Supreme Court regarding the above matter:

1. Respondent's Answer to Petition for Review (with attached Certificate of Service)

Thank you for your assistance.

Sincerely,

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