

IN THE SUPREME COURT OF THE STATE OF OREGON

EVERGREEN WEST BUSINESS CENTER, LLC, an Oregon limited liability company,
Plaintiff-Respondent
Cross-Appellant,
Petitioner on Review,
v.
TERRY W. EMMERT,
Defendant-Appellant
Cross-Respondent,
Respondent on Review,
And
PREMIER WEST BANK,
Impartial.
S061049 (Control)

EVERGREEN WEST BUSINESS CENTER, LLC, an Oregon limited liability company,
Plaintiff-Respondent
Cross-Appellant,
Respondent on Review,
v.
TERRY W. EMMERT,
Defendant-Appellant
Cross-Respondent,
Petitioner on Review,
And
PREMIER WEST BANK,
Impartial.
S0611158

RESPONDENT TERRY W. EMMERT'S RESPONSE BRIEF ON THE MERITS

On Review from a decision of the Court of Appeals on appeal from a judgment of the
Circuit Court of Clackamas County, Honorable Jeffrey S. Jones
Opinion Filed December 27, 2012

Author of Opinion: Schuman, P.J.
Concurring Judge: Armstrong
Dissenting and Concurring (on other issue): Wolheim

August 2013

Hollis K. McMilan, OSB No. 70195
Hollis K. McMilan, P.C.
Attorney for Petitioner, Terry W. Emmert
805 SW Broadway, Ste. 1900
(503) 972-5092
hmcmlan@hkmlaw.com

John M. Berman, OSB No. 72024
J. Rion Bourgeois, OSB No. 76069
Attorneys for Respondent, Evergreen West
Business Center
7175 Beveland St., Ste. 210
Tigard, OR 97223
(503) 670-1122
jberman976@aol.com
rion@att.net

Cody Hoesly, OSB No. 052860
LARKINS VACURA LLP
621 SW Morrison St., Suite 1450
Portland, OR 97205
(503) 222-4424
choesly@larkinsvacura.com
Counsel for *Amicus Curiae*
Oregon Trial Lawyers Association

Phil Goldsmith, OSB No. 782230
Law Office of Phil Goldsmith
1618 SW First Avenue, Suite 350
Portland, OR 97201
(503) 224-2301
phil@lopglaw.com
Counsel for *Amicus Curiae*
Oregon Trial Lawyers Association

TABLE OF CONTENTS

	Page
I. LEGAL QUESTION PRESENTED ON REVIEW	1
II. PROPOSED RULE OF LAW	1
III. NATURE OF THE ACTION	1
IV. RELIEF SOUGHT IN THE TRIAL COURT	2
V. NATURE OF THE JUDGMENT	2
VI. STATEMENT OF MATERIAL FACTS	3
VII. SUMMARY OF THE ARGUMENT	7
VIII. ARGUMENT	8
IX. CONCLUSION	14

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Amer. Timber/Bernard v. First Nat’l.</i> , 263 Or 1, 11, 500 P2d 1204 (1972).....	11
<i>Brown v. Brown</i> , 206 Or App 239, 251, 136 P3d 745 (2006).....	14
<i>Carey v. Hays</i> , 243 Or 73, 77, 409 P2d 899 (1966).....	10, 11, 12
<i>Evergreen West Bus. Ctr., LLC v. Emmert</i> , 254 Or App 361, 373, 296 P3d 545(2012)	8, 14

Fleischner v. Citizens' Real Estate & Inv. Co.,
25 Or 119, 130, 35 P 174 (1893).....8

Hollen v. Fitzwater,
125 Or App 288, 292, 865 P2d 1298 (1993) *rev. den.*, 319 Or 80,
876 P2d 783 (1994).....13

M.F.K. v. Miramontes,
352 Or 401, 414, 287 P3d 1045 (2012).....10, 11

Thompson v. Coughlin,
329 Or 630, 637-38, 997 P2d 191 (2000).....10, 11

RULES

ORCP 51C.....12

I. LEGAL QUESTION PRESENTED ON REVIEW

When a jury has made a specific finding that defendant has been unjustly enriched in the amount of only \$1.00 by foreclosing on property formerly owned by plaintiff, may the court impose a constructive trust on the property that requires sale of the property and payment of more than \$1.00 from the proceeds of the sale to the plaintiff?

II. PROPOSED RULE OF LAW

Where a jury has made a specific finding that defendant has been unjustly enriched in a nominal amount of \$1.00 and there is no other clear and convincing evidence tending to show unjust enrichment, the court may not grant plaintiff a constructive trust that results in plaintiff being paid unjust enrichment damages in an amount greater than that found by the jury.

III. NATURE OF THE ACTION

Plaintiff Evergreen West Business Center, LLC (“LLC”) sued Mr. Emmert seeking damages for an alleged breach of fiduciary duty. Plaintiff also sought alternative relief in the form of a constructive trust. Plaintiff’s complaint asserted that Mr. Emmert agreed to provide financial assistance to the LLC in order to forestall the scheduled foreclosure of a note and trust deed by which the LLC had acquired a loan to purchase and develop property. The complaint further alleged that Mr. Emmert agreed to obtain a new development loan on

behalf of the LLC. Finally, the complaint alleged that Mr. Emmert purchased the note and trust deed, foreclosed on the property, and purchased the property for himself.

IV. RELIEF SOUGHT IN THE TRIAL COURT

The LLC sought a judgment declaring: 1) that Mr. Emmert held the purchased property in a constructive trust for the LLC; 2) that the affairs of the LLC be wound up; 3) that the property be sold; 4) that the proceeds be disbursed to the LLC's creditors; and, 5) that the remainder, if any, be distributed to the LLC's members.

In the alternative, if a constructive trust was not imposed, the LLC sought money damages from Mr. Emmert measured by the amount Mr. Emmert had been unjustly enriched when he foreclosed on the note and trust deed and then purchased the property himself.

During the course of the litigation, LLC was allowed to amend its claims for relief to include an award of punitive damages.

At no time during the course of the litigation did LLC ever seek re-conveyance of the property as a remedy.

V. NATURE OF THE JUDGMENT

The jury found Mr. Emmert liable to pay \$1.00 in actual damages and \$600,000.00 in punitive damages. On Mr. Emmert's motion, the court reduced

the punitive damage award to \$4.00. LLC then asked the court to impose a constructive trust. The court ruled that LLC was entitled to a constructive trust under which LLC would sell the property and pay the first \$613,979.49 in sale proceeds to Mr. Emmert to reimburse him for the amount he paid for the property. The constructive trust further provided that Mr. Emmert shall be responsible for paying any obligations for which he pledged the property. If he failed to do so and proceeds from the sale were used to pay said debt in excess of \$613,979.49 then LLC is entitled to a supplemental judgment for such sums.

VI. STATEMENT OF MATERIAL FACTS¹

A. Material Facts Underlying the Lawsuit

LLC was formed to purchase land and develop a small business park. Tr. 139. Terry Emmert was one of four original members of the LLC. He was asked to become a member of the LLC because of his financial strength and the other members' financial positions could not support a loan of the size needed to purchase the property and develop the business park. Mr. Emmert held 1/3 of the membership interests directly and another 1/12 of the interests indirectly as the 50% owner of Builder's Inc., a member of the LLC that was a corporation.

¹ Section A of the Statement of Material Facts has largely been copied from Mr. Emmert's Opening Brief on the Merits. It has been copied here so the reader does not have to move between two separate briefs to follow references to the facts. Section B sets forth material facts regarding how the case was pleaded and tried.

Tr. 145-146. The LLC was managed by one of its members, Brad Taggart. Mr. Taggart held 1/6 of the membership interests directly and another 1/12 of the interests indirectly as the other 50% owner of Builder's Inc. *Id.*

In early 2004, LLC was running out of money and needed another loan to continue its development work and pay off the existing bank loan. Tr. 161 – 162. As manager, it was Mr. Taggart's responsibility to handle all financial affairs of the LLC, including arranging financing. Ex. 2. Throughout 2004, Mr. Taggart attempted to locate alternative financing for the LLC. Tr. 161 – 171. The original lender, West Coast Bank, began to threaten foreclosure. It notified LLC that it would hold a foreclosure sale in August 2004. Tr. 179. The bank then moved the foreclosure date to September 15, 2004. *Id.* At Mr. Taggart's request, Mr. Emmert paid West Coast Bank \$50,000 get the bank to postpone the foreclosure sale another 30 days to October 15, 2004. Tr. 170 – 173, 179. The reason the extension was sought was to get more time to try to arrange take out financing through Premier West Bank. Tr. 165 – 166. Mr. Emmert waited until the eve of foreclosure to pay the \$50,000.00 to forestall the September foreclosure. Tr. 179-180. At that point, no loan could have been made because Evergreen was administratively dissolved as of August 2004 and the bank would not loan to an administratively dissolved LLC. Tr. 84-88, 452-453.

Furthermore, Mr. Taggart had allowed LLC's bank account to become overdrawn and closed as of September 30, 2004. Tr. 271 – 272, Ex. 132.

Had Mr. Emmert not stepped in and paid the foreclosing bank \$50,000 on behalf of LLC, the bank would have foreclosed on the property in September 2004. Tr. 173, 180, 189-190. Nothing in the Evergreen Operating Agreement (Ex. 2) or Oregon statutes (ORS 63.001 et seq.) would have prohibited Mr. Emmert from purchasing the property at a foreclosure sale.

Mr. Emmert had personally guaranteed the West Coast Bank loan on the subject property. Mr. Emmert had been notified that the bank would look only to him to repay the loan. Ex. 112. Mr. Emmert began discussing the possibility of purchasing the note and trust deed from West Coast Bank in early September 2004. Tr. 182. Mr. Emmert did not tell Mr. Taggart that he was discussing the possibility of purchasing LLC's note and trust deed from West Coast Bank and foreclosing on the property himself. Tr. 173 – 174, 577 – 578.

By October 14, the day before the scheduled foreclosure, and the date upon which Mr. Emmert purchased the note and trust deed from West Coast Bank, it was apparent that LLC could not possibly have redeemed the property from foreclosure status. Tr. 182, 566 - 568. LLC lost the property because it failed to make payments to the bank and was dilatory in seeking financing, all obligations of the manager of the LLC, (Tr. 176 - 204, Tr. 407 - 454), not

because of anything Mr. Emmert did or failed to do. Mr. Emmert did not disclose to LLC members that he had purchased the note and trust deed, conducted the foreclosure sale, and purchased the property. Tr. 577 – 578.

B. Material Facts Regarding Trial of the Lawsuit.

In its complaint, LLC alleged:

5.

Defendant Emmert agreed to provide financial assistance to Plaintiff in order to avoid the pending foreclosure and to obtain said development loan so that the acquisition loan would be paid with the proceeds from the development loan, and so that said project could be developed, and took responsibility for arranging for a stay of said foreclosure.

6.

Without the knowledge of Plaintiff, instead of providing the financial assistance that Defendant represented and agreed to provide, and instead of arranging for a stay of said foreclosure, Defendant purchased the lender's note and trust deed from the lender and then foreclosed on said real property and took ownership of it for his own account, all without notifying Plaintiff or the other members that he was doing or had done so.

ER – 2.

The testimony at trial painted a very different picture than what had been alleged. LLC's managing member, Brad Taggart, testified not that Mr. Emmert agreed to obtain the development loan, but that Mr. Emmert told Taggart to focus on obtaining the development loan and that he, Mr. Emmert, would take care of West Coast Bank. Tr. 173. It is not in dispute that Mr. Emmert obtained

an extension of the foreclosure from September 15, 2004 to October 15, 2004 by paying West Coast Bank \$50,000.00 of his own money. ER – 29.

The only money damages LLC prayed for in its claim against Mr. Emmert were based upon the amount Mr. Emmert had been unjustly enriched by purchasing the property. ER – 4. The trial court explicitly adopted the jury's findings with regard to the amount of actual damages in its judgment awarding LLC a constructive trust. ER – 29.

LLC's counsel argued to the jury both in his opening statement and closing argument his theory of damages to the court and to the jury. At no time did counsel ever suggest that LLC's damage should be measured or assessed other than by reference to the difference between the fair market value of the property and the price paid by Mr. Emmert for the property. No evidence was presented that tended to show that LLC had suffered any other actual damage. Tr. 114 – 120, 843 - 844. LLC did not ask to have the property re-conveyed to it.

VII. SUMMARY OF ARGUMENT

LLC asked for money damages arising from Mr. Emmert alleged breach of fiduciary duty. Such a claim is legal in nature and is appropriately tried to a jury.

The jury returned a verdict in favor of LLC finding that Mr. Emmert had been unjustly enriched in the amount of \$1.00. No other findings regarding unjust enrichment were asked for from the jury either by LLC or the trial court. No additional findings were made by the trial court. The court is bound by the jury's findings.

An essential element of proof in establishing the right to the exceptional equitable remedy of a constructive trust is that a defendant would be unjustly enriched if allowed to hold onto the property in question. Here, since LLC could only prove unjust enrichment in the amount of \$1.00, LLC failed to prove an essential element that would entitle it to a constructive trust.

VIII. ARGUMENT

A. Introduction

This case is not about whether Oregon law allows the imposition of a constructive trust in addition to or in lieu of an award of unjust enrichment damages at law. Rather, the question presented is this: May a court impose a constructive trust where one of the essential elements of imposing such a trust has been found not to exist by a jury and the conditions imposed by the trust contravene or ignore the factual findings of the jury? To understand this, it is important to focus on what the Court of Appeals held in reversing the trial court's imposition of a constructive trust and why it so held. First, the Court of

Appeals correctly noted that LLC tried its case entirely on the theory that Mr. Emmert had been unjustly enriched by purchasing property formerly owned by LLC at a price more than \$700,000 below the property's fair market value. LLC never contended that it was entitled to damages measured by its loss of the property to foreclosure,² or that the property should be re-conveyed to it,³ or that Mr. Emmert had been or would be unjustly enriched in some way other than by immediately benefitting from the difference between the price he paid for the property and its market value. What the Court of Appeals held, in essence, was that LLC had failed to prove an essential element of obtaining the equitable relief sought, i.e. that Mr. Emmert had been unjustly enriched in an amount that warranted imposition of a constructive trust. Its holding goes on to explain that a constructive trust may not be imposed in order to grant unjust enrichment damages in excess of what the jury awarded. As more succinctly stated by the Court of Appeals, "Equitable remedies are not for the purpose of correcting disappointing jury verdicts or remedying a failure of proof." *Evergreen West Bus. Ctr., LLC v. Emmert*, 254 Or App 361, 373, 296 P3d 545 (2012). The only

² In footnote 3 of its opinion the Court of Appeals explicitly recognized that there was "scant" evidence that LLC was harmed by losing the property to foreclosure since that is what would have happened regardless of what Mr. Emmert did.

³ While the court did not comment on the fact that LLC's complaint sought alternative remedies, it is nonetheless important to keep in mind that LLC never took the position that it was entitled to both actual damages and equitable relief in the form of a constructive trust.

reasonable interpretation of what the court was referring to as a “failure of proof” was LLC’s failure to prove unjust enrichment – an essential element of showing entitlement to a constructive trust.

**B. Plaintiff’s Claim Was An Action At Law And Therefore
Appropriately Tried To A Jury:**

“A claim seeking only monetary compensation for injuries inflicted is an " action at law," and the [Oregon] constitution, by its terms, preserves the right to jury trial for such legal claims.” *M.F.K. v. Miramontes*, 352 Or 401, 414, 287 P3d 1045 (2012), also see, *Fleischner v. Citizens’ Real Estate & Inv. Co.*, 25 Or 119, 130, 35 P 174 (1893) (where the compensation is for injury caused, the remedy is an action at law); *Carey v. Hays*, 243 Or 73, 77, 409 P2d 899 (1966) (claim is at law if relief sought is a certain sum of money); *Thompson v. Coughlin*, 329 Or 630, 637-38, 997 P2d 191 (2000) (right to jury trial attaches to legal claim for specified sum of money).

**C. The Jury’s Verdict Provided The Definitive Measure of LLC’s
Unjust Enrichment Damages.**

LLC made a claim for breach of fiduciary duty and requested a sum of money to compensate it for its injury, either through a constructive trust to effectuate the sale of real property to obtain the difference between Mr. Emmert’s purchase price and what LLC could obtain in a forced sale, or

through a jury verdict and judgment for money damages. Because it requested solely monetary compensation for injuries inflicted, LLC's claim was at law and was properly heard by the jury. *Id.*, *M.F.K. v. Miramontes*, 352 Or at 414. A request for a money judgment is legal, not equitable. *Amer. Timber/Bernard v. First Nat'l.*, 263 Or 1, 11, 500 P2d 1204 (1972).

Whether jurisdiction of an action is in law or in equity is determined by the nature of the relief sought in the complaint. *Carey v. Hays*, 243 Or 73, 77, 409 P2d 899 (1996). See also *Thompson v. Coughlin*, 329 Or 630, 637-38, 997 P2d 191 (2000) (test for determining whether jurisdiction is in law or equity generally turns on the nature of the relief sought in the pleadings and the labels applied by the parties are not dispositive.) In *Carey*, the court reasoned that actions such as accountings, while originally only available through equity, could nevertheless be maintained at law if the relief sought by the plaintiff could "adequately be given at law." *Carey*, 243 Or at 77.

The plaintiff in *Carey* had asked for money damages and also that defendant should be required to account to plaintiffs for all moneys received by defendants from the purchase and sale of certain property. The *Carey* court reasoned that while the complaint was styled as a request for an "accounting", a formal equitable accounting whereby "debits and credits are balanced or a balance of mutual accounts is struck" wasn't necessary under the circumstances

because the amount of money received by the defendant had been ascertained. The court concluded that because the plaintiff had sought relief in the form of a “judgment for a specified sum of money determinable without any accounting,” the proceedings were legal, not equitable. *Id.*, at 82.

Here, LLC pled damages for injury caused by the defendant’s breach of fiduciary duty in the amount of “not less than \$800,000.00,” and argued to the jury and the trial court that the amount Mr. Emmert had been unjustly enriched was the difference between the purchase price paid by Mr. Emmert and the value of the property at the time he purchased the property. Before the verdict, LLC never asserted or argued that its damages were unascertainable or that LLC was entitled to an amount over and above Mr. Emmert’s “equity” in the property. Thus, the jury’s finding of \$1.00 in damages was the definitive statement of the extent and amount of Mr. Emmert’s unjust enrichment. ORCP 51C. The court specifically adopted the jury’s damages finding and so stated in the general judgment. ER – 29. Other than stating that it adopted the jury’s findings, the trial court made no other findings regarding what unjust enrichment, actual or potential, had been proven that would warrant the imposition of a constructive trust. Neither did LLC or the court ask the jury to answer any specific questions relating to unjust enrichment beyond the questions in the verdict form filled in by the jury.

D. Proof of Unjust Enrichment Is An Essential Element In Showing Entitlement To A Constructive Trust.

A litigant seeking imposition of a constructive must show: “(1) the existence of a confidential or fiduciary relationship; (2) a violation of a duty imposed by that relationship; and (3) failure to impose the constructive trust would result in unjust enrichment.” *Hollen v. Fitzwater*, 125 Or App 288, 292, 865 P2d 1298 (1993) *rev. den.*, 319 Or 80, 876 P2d 783 (1994) (citations omitted). Each of these elements must be proven by strong, clear, and convincing evidence. *Id.* The jury found that a fiduciary duty arose when Mr. Emmert told Mr. Taggart that Mr. Emmert would “contact, handle or deal with West Coast Bank.” ER – 26. It also found that he breached that duty by foreclosing on the property. *Id.* Finally, it found that LLC’s actual damages were \$1.00. *Id.* Thus elements one and two were shown. Given that only \$1.00 in unjust enrichment damages were found, however, the question arises whether such nominal damage would support element number 3.

Rather than argue the point, Mr. Emmert conceded that the jury’s finding could probably support imposition of a constructive trust to recoup the \$1.00 damages found by the jury. The Court of Appeals also acknowledged such a possibility but then dismissed the idea saying that it clearly was not the trial court’s intent to use the constructive trust remedy to ensure payment of \$1.00 in

damages. *Evergreen*, 254 Or App at fn 2. Furthermore imposing such an “exceptional equitable remedy” solely to ensure payment of \$1.00 would be unwarranted. *Brown v. Brown*, 206 Or App 239, 251, 136 P3d 745 (2006). On the record presented the Court of Appeals was correct in finding that there had been a failure of proof relating to the constructive trust and it was correct in reversing the trial court’s award of the judgment imposing a constructive trust.

IX. CONCLUSION

The Court of Appeals’ decision reversing the trial court’s judgment imposing a constructive trust was correct and should be affirmed by this court. The plaintiff LLC failed to prove an essential element showing its entitlement to the exceptional equitable remedy of a constructive trust.

Respectfully submitted,

s/ Hollis K. McMilan
Hollis K. McMilan, OSB No. 760195
Attorney for Respondent on
Review/Petitioner on Review
Terry W. Emmert

**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH
AND TYPE SIZE REQUIREMENTS**

I certify that: (1) This brief complies with the word-count limitation in ORAP 5.05(2)(b); and, (2). The word count of this brief (as described in 5.05(2)(a)) is 3168.

I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Dated this 30th day of August, 2013

s/ Hollis K. McMilan
Hollis K. McMilan, OSB No. 760195
Attorney for Respondent on
Review/Petitioner on Review
Terry W. Emmert

CERTIFICATE OF FILING AND SERVICE

I certify that on August 30, 2013, I caused to be electronically filed the foregoing RESPONDENT ON REVIEW TERRY W. EMMERT'S RESPONSE BRIEF ON THE MERITS with the Appellate Court Administrator by using the eFiling system.

I further certify that on said date I caused copies of the document to be sent by electronic mail via the court's eFiling system to the e-mail addresses indicated below:

John M. Berman OSB No. 720248
Jberman976@aol.com
J. Rion Bourgeois OSB No. 76069
rion@att.net
7175 SW Beveland St., Ste. 210
Tigard, OR 97223
(503) 670-1122
Attorneys for Petitioner Evergreen West

Cody Hoesly, OSB No. 052860
LARKINS VACURA LLP
621 SW Morrison St., Ste. 1450
Portland, OR 97205
(503) 222-4424
choesly@larkinsvacura.com
Counsel for *Amicus Curiae*
Oregon Trial Lawyers
Association

Phil Goldsmith, OSB No. 782230
Law Office of Phil Goldsmith
1618 SW First Ave., Ste. 350
Portland, OR 97201
(503) 224-2301
phil@loplaw.com
Counsel for *Amicus Curiae*
Oregon Trial Lawyers Association

s/ Hollis K. McMilan
Hollis K. McMilan, OSB No. 760195
Attorney for Petitioner on
Review/Respondent on Review
Terry W. Emmert