

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

**JEFFREY A. FLORES**  
FLORES LAW OFFICE  
Madison, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

IN THE MATTER OF THE UNSUPERVISED )  
ESTATE OF LUTHER PENICK )

KEITH PENICK, )

Appellant, )

vs. )

No. 78A01-1103-EU-163

SHAWN PENICK, )

Appellee. )

---

APPEAL FROM THE SWITZERLAND CIRCUIT COURT  
The Honorable W. Gregory Coy, Judge  
Cause No. 78C01-1004-EU-10

---

**October 4, 2011**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Defendant, Keith Penick (Keith), as personal representative of the unsupervised estate of Luther Penick (Estate), appeals the trial court's Order granting Appellee-Plaintiff's, Shawn Penick (Shawn), claim against the Estate in the amount of \$25,000.

We affirm.

## ISSUES

Keith raises four issues on appeal, which we consolidate and restate as follows:

- (1) Whether the trial court abused its discretion by finding Shawn to be a competent witness pursuant to the Dead Man's Statute;
- (2) Whether the trial court abused its discretion by not considering Keith's evidence concerning set-off; and
- (3) Whether the trial court abused its discretion when it concluded that Keith had been unjustly enriched.

## FACTS AND PROCEDURAL HISTORY

Luther Penick (Luther) died testate on March 7, 2010. Approximately three months before Luther's death, his son, Shawn, made arrangements to have a lake built on Luther's property in Rising Sun, Switzerland County, Indiana. Shawn employed Matt Lieland (Lieland) as general contractor to perform the work. There was no written contract between Shawn and Lieland. Prior to commencing any work, Lieland required payment of 50% of the work's value. Because Shawn did not have the funds to pay

Lieland, he gave Lieland a credit of \$10,000 toward the purchase of land Shawn owned and which he sold to Lieland.

After Luther's death in March of 2010, Luther's brother, Keith, became the personal representative of the Estate. In accordance with the provisions of Luther's will, Keith inherited Luther's entire Estate, with an approximate value of \$200,000. At that time, the work on the lake was not yet completed but had been stopped because of the weather. Prior to resuming the work, Shawn approached Keith and inquired what to do about the lake. Keith told Shawn to "finish it." (Transcript p. 18).

At some point, Shawn arranged a second in-kind payment to Lieland. This time, Shawn gave Lieland a pre-engineered steel building worth \$15,000 as payment for his work on the lake. In April of 2010, the work on the lake stopped before it was completely finished.

On July 20, 2010, Shawn filed his Complaint against the Estate, requesting payment in the amount of \$35,000 for installing a lake on the decedent's property. On January 18, 2011, the trial court conducted a hearing on the Complaint. Three days later, on January 21, 2011, the trial court issued its Order, granting Shawn a judgment of \$25,000 against the Estate.

Keith now appeals. Additional facts will be provided as necessary.

#### DISCUSSION AND DECISION

At the outset, we note that Shawn did not file a brief. When an appellee does not submit a brief, an appellant may prevail by establishing a *prima facie* case of error, *i.e.*, error at first sight. *Elrod v. Brooks*, 910 N.E.2d 231, 233 (Ind. Ct. App. 2009). By using

a *prima facie* error standard, this court is relieved of the burden of developing arguments for the appellee. *Id.*

### I. *Dead Man's Statute*

Keith first contends that the trial court abused its discretion when it found Shawn competent to testify against the Estate pursuant to the provisions of the Dead Man's Statute.

The general purpose of Indiana's Dead Man's Statute is to protect a decedent's estate from spurious claims. *Kalwitz v. Estates of Kalwitz*, 759 N.E.2d 228, 232 (Ind. Ct. App. 2001), *reh'g denied, trans. denied*. As an exception from the general rule that all persons are competent witnesses, the Dead Man's Statute guards against false testimony by a survivor by establishing a rule of fairness and mutuality requiring that, "when the lips of one party to a transaction are closed by death, the lips of the surviving party are closed by law." *Fisher v. Estate of Haley*, 695 N.E.2d 1022, 1026-27 (Ind. Ct. App. 1998); *Satterthwaite v. Satterthwaite's Estate*, 420 N.E.2d 287, 289 (Ind. Ct. App. 1981). Rather than excluding evidence, the Statute prevents a particular class of witnesses from testifying as to claims against the estate. *Fisher*, 695 N.E.2d at 1027. Specifically, the Dead Man's Statute provides, in relevant part, that in suits or proceedings:

- (1) in which an executor or administrator is a party;
- (2) involving matters that occurred during the lifetime of the decedent; and
- (3) where a judgment or allowance may be made or rendered for or against the estate represented by the executor or administrator . . .  
a person:
  - (1) who is a necessary party to the issue or record; and
  - (2) whose interest is adverse to the estate;is not a competent witness as to matters against the estate[.]

Ind. Code § 34-45-2-4.

Where, as here, the trial court rules on witness competency, the ruling will not be reversed absent a clear abuse of discretion. *Kalwitz*, 759 N.E.2d at 232. An abuse of discretion will be found when the ruling is against the logic and effect of the facts and circumstances before the court. *Id.*

It is undisputed that Keith, as personal representative of the Estate, is a party to this action. Any judgment entered in this cause will either be to the Estate's gain or loss. Shawn, as claimant, is a necessary party to the case and his interest is adverse to the Estate as he filed a \$35,000 claim against the Estate. Thus, the only element at issue is whether this cause involves matters that occurred during the lifetime of the decedent.

We have previously held that "matters that occurred during the lifetime of the decedent" are limited to circumstances in which the decedent, if alive, could have refuted the testimony of the surviving party. *J.M. Corp. v. Roberson*, 749 N.E.2d 567, 571 (Ind. Ct. App. 2001). The Dead Man's Statute only applies where the claimant is prepared to testify as to matters or transactions concerning the decedent, and not merely as to matters that occurred while the decedent was alive. *Johnson v. Estate of Rayburn*, 587 N.E.2d 182, 185 (Ind. Ct. App. 1992), *superseded by statute on other grounds as stated in Gipperich v. State*, 658 N.E.2d 946, 950 (Ind. Ct. App. 1995), *trans. denied*.

The trial court permitted Shawn to testify about his arrangement with Lieland to build the lake. Shawn stated that he had contracted to get the lake built on Luther's property, with an initial in-kind payment valued at \$10,000. While this testimony relates to "matters that occurred while Luther was alive," this is not a transaction concerning the

decendent since the arrangement was between Shawn and Lieland. In fact, Lieland testified that the agreement to build the lake was with Shawn, never with Luther. In that regard, Luther could not have refuted or confirmed the initial payment. With respect to these events, we agree with the trial court that Shawn was a competent witness.

In addition, the trial court permitted Shawn to testify that the construction ceased during winter and was commenced again sometime in spring. Shawn stated that upon Luther's death, he approached Keith and asked him "now that Dad is dead, I don't know what to do [with the lake]." (Tr. p. 18). According to Shawn's testimony, Keith responded, "[f]inish it." (Tr. p. 18). Keith conceded that he "never stopped [Shawn] at all on building the lake[.]" (Tr. p. 26). Keith also mentioned that "[i]t is my understanding that [the] lake was always to be on Luther's property." (Tr. p. 54). Shawn further testified that Lieland continued work on the lake and received a second in-kind payment of \$15,000. This testimony relates to events occurring after Luther's death and as such, is permissible under the Dead Man's Statute. Therefore, we affirm the trial court when it rendered Shawn competent to testify.

## II. *Evidence on Set-Off*

Next, Keith contends that the trial court abused its discretion when it did not take Keith's evidence on set-off into account. At trial, Keith asserted the argument that Shawn's claim should be set-off by the amount needed to finish construction on the lake.

Indiana Trial Rule 13 distinguishes between two types of counterclaims that may be asserted in a cause of action. A compulsory counterclaim is described as

[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject-matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Ind. T.R. 13(A). On the other hand, a permissive counterclaim is “any claim against an opposing party not arising out of the transaction or occurrence that is the subject-matter of the opposing party's claim.” Ind. T.R. 13(B).

Because Keith's counterclaim arose out of the same operative facts as the construction of the lake, asserted in the Complaint, Keith's claim of set-off is necessarily a form of compulsory counterclaim. However, Keith never asserted this counterclaim in his pleading, nor did he file a supplemental pleading.

Nevertheless, under the provisions of Indiana Trial Rule 15(B), when an issue not raised by a pleading is tried by the implied consent of the parties, the pleadings are treated as amended to include the issue.

If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

T.R. 15(B).

Although Shawn initially objected to Keith's claim of a possible set-off for rent payments owed by Shawn to the Estate, Shawn never objected to a set-off based on the amount needed to complete construction of the lake. In fact, Keith established this claim based on the testimony of Shawn's own witness. As such, we find that the claim of a set-

off based on the amount still needed to finish construction was tried by implied consent of the parties.

However, in its Order, the trial court did not award any set-off to Keith. Having reviewed the record, we agree. While Shawn's witness testified that another \$2,200 would be required to complete construction on the lake, the witness also admitted that he had not looked at the lake recently. In fact, in his testimony the witness did not commit to a firm number, instead stating that the additional cost to complete the lake would depend on how bad the erosion was. In the absence of any evidence establishing the amount for set-off, we cannot say that the trial court abused its discretion.

### III. *Equitable Estoppel*

Lastly, Keith asserts that the trial court abused its discretion by granting Shawn's claim against the Estate in the amount of \$25,000. In its Order, the trial court concluded that "Keith would be equitably estopped from denying the claim for the reason that he would be unjustly enriched as sole heir of the [E]state by inheriting a farm with a lake which likely adds to the value of the farm, and for which nothing was paid." (Appellant's App. p. 7).

To successfully assert a claim for unjust enrichment, the plaintiff must establish that a measurable benefit has been conferred upon the defendant under such circumstances that the defendant's retention of the benefit without payment would be unjust. *Truck City v. Gary, Inc. v. Schneider Nat. Leasing*, 814 N.E.2d 273, 280 (Ind. Ct. App. 2004). Principles of equity prohibit unjust enrichment in cases where a party accepts the unrequested benefits another provides despite having the opportunity to

decline those benefits. *Id.* However, a party seeking to recover under this theory must demonstrate that the benefit was rendered to another at the express or implied request of such other party. *Kelly v. Levandoski*, 825 N.E.2d 850, 861 (Ind. Ct. App. 2005), *trans. denied*. The equitable concept of unjust enrichment necessarily inheres any time the remedy of restitution is sought by a litigant. *Community Care Centers, Inc.v. Sullivan*, 701 N.E.2d 1234, 1239 (Ind. Ct. App. 1998), *reh 'g denied, trans. denied*.

The record reflects that Keith, as sole heir of the Estate, inherited Luther's property, including the lake. Although the construction of the lake commenced during Luther's lifetime, it was not finished prior to his death. Shawn stated that upon Luther's death, he approached Keith and asked him "now that Dad is dead, I don't know what to do [with the lake]." (Tr. p. 18). According to Shawn's testimony, Keith responded, "[f]inish it." (Tr. p. 18). Keith conceded that he "never stopped [Shawn] at all on building the lake[.]" (Tr. p. 26). As such, Keith requested Shawn to continue construction on the lake. The evidence reflects that Shawn contracted for the construction with Lieland and paid him two in-kind payments for a total amount of \$25,000. Shawn stated that he was never reimbursed for the construction of the lake on Luther's property. Therefore, we agree with the trial court that denying Shawn's claim against the Estate would unjustly enrich Keith.

#### CONCLUSION

Based on the foregoing, we hold that (1) Shawn was a competent witness pursuant to the Dead Man's Statute; (2) the trial court did not abuse its discretion when it excluded Keith's offered exhibits and concluded, in effect, that Keith had failed to carry his burden

of proof; and (3) Keith had been unjustly enriched by the construction of the lake on his property.

Affirmed.

NAJAM, J. and MAY, J. concur