No. 101219-5
Court of Appeals Case No. 83416-9-I

SUPREME COURT
OF THE STATE OF WASHINGTON

THE NGUYEN FAMILY TRUST,

Appellant,

v.

DARLENE PIPER and AMERICAN LEBANESE SYRIAN ASSOCIATED CHARITIES, INC. D.B.A. ST. JUDE CHILDREN'S RESEARCH HOSPITAL,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Nguyen Family Trust (the Trust) asserted a single equitable cause of action against St. Jude Children's Research Hospital (St. Jude): unjust enrichment. The jury's factual findings, the trial court's summary judgment order, and the Court of Appeals' ruling foreclose the equitable relief sought by the Trust because it has an adequate remedy at law against the wrongdoer. Moreover, even if the Trust could be awarded equitable relief, the undisputed facts foreclose any finding of unjust enrichment because the Trust received consideration for the money it sent to defendant Darlene Piper—an interest in a foreign securities investment. The Court should deny the Trust's Petition for Review (Petition) and the Trust should enforce its judgment against Defendant Piper.

II. COUNTER-STATEMENT OF ISSUES

1. Whether this Court should deny the Trust's Petition when the Trust has an adequate remedy at law against the wrongdoer, and therefore cannot be awarded the requested

equitable relief (*i.e.*, a constructive trust) against innocent, third-party, St. Jude.

2. Whether this Court should deny the Trust's Petition because the Trust cannot prove the necessary facts to prevail on its unjust enrichment claim against St. Jude.

III. STATEMENT OF THE CASE

The jury awarded the Trust a clear legal remedy against the wrongdoer, Ms. Piper, for her fraudulent sale of a security to the Trust. Following the verdict, the Trust sought a fee award against Ms. Piper for $329,933.75 pursuant to the Washington State Securities Act (WSSA). In its motion, the Trust correctly argued that "[t]he jury in this case found that Defendant Piper sold a security to the Trust in violation of the WSSA."[1] The Trust proposed a judgment against Ms. Piper for $562,500, including that "[p]ost-judgment interest shall accrue on the Trust's WSSA damages of $500,000 at the rate of 8%

[1] CP 1193-1201 (Pl.'s Mot. For Attorneys' Fees (July 24, 2020), p. 3.).

per annum…"[2]

The record is devoid of evidence that the Trust has attempted to enforce its judgment against Ms. Piper. Instead, it has sought to convert St. Jude–which indisputably played no role in the transaction–into its *de facto* insurer to cover the losses from its reckless investment. But equitable relief is only available in circumstances where principles of justice and fairness demand it.

A. The Trust agreed to invest in a Paraguayan security.

On September 9, 2015, the Trust purchased a securities investment by transferring $500,000 to Ms. Piper's account.[3] In its discovery responses, Plaintiff specifically identified this exchange of consideration as the transaction that violated the WSSA.

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[2] CP 776-77; RCW 21.20.430.

[3] CP 627-28; *see also* CP 1324-28 (Trial Ex. 468), CP 1035-36 (Trial Ex. 73). Of the $515,000 transferred, $15,000 was for repayment of a loan Ms. Chapman owed to Ms. Piper. The $500,000 was designated for investment in Ms. Piper's name in a Paraguayan security.

INTERROGATORY NO. 2:
Identify the date of the security transaction that you contend gives rise to your Washington State Securities Act claim against Defendant Darlene Piper.
ANSWER:
September 9, 2015

The Trustee made the investment at the request and on the recommendation of his mother, Tina Chapman, the Trust's settlor and longtime best friend of Ms. Piper.[4] Neither the Trustee (despite his role as a fiduciary) nor Ms. Chapman did any independent research regarding the investment options presented by Ms. Piper. Both testified at trial that they believed Ms. Piper was investing the Trust's funds in a Paraguayan bond as opposed to the partial interest in the mortgage-backed security (the Marengo loan) in which Ms. Piper actually invested the funds.[5] While discussing potential investments earlier that month, Ms. Piper had provided Ms. Chapman with

[4] CP 1312-23 (Trial Ex. 463).

[5] RP Vol. 7, p. 94:9 ("My mom's bond investment under Ms. Piper."); RP Vol. 2, p. 111:18-20 ("My decision is to go to the government bank bond that Darlene explained to me safe.")

information about both investments.[6]

At trial, no party introduced any evidence rebutting the fact admitted by the Trust that the $500,000 transfer in exchange for the share of the foreign investment constituted a "securities transaction."[7] Indeed, at trial financial industry expert Neil Beaton testified that the September 9, 2015 investment "was a transaction. It was a transaction in a security that is the pure definition of a security. It was an asset-backed security. She entered into that transaction at that point in time, and that's my opinion."[8]

In addition to serving as the Trust's informal broker, Ms. Piper was also the personal representative of the Estate of Jack Yates, and was empowered by Mr. Yates's will to "sell, convey, mortgage, transfer or in any manner alienate or encumber" the Estate "as in her judgment may be deemed

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[6] CP 820-30.

[7] CP 1326 (Trial Ex. 468)

[8] RP Vol. 9, p. 110:21-25.

advantageous."[9] Mr. Yates's will left the residuary of his Estate to St. Jude.[10] In September 2014, Ms. Piper invested $520,000 of the Estate's funds (and $280,000 of her personal money) in a mortgage-backed loan to a Paraguayan national named Ramon Ever Marengo Subeldia.[11] The loan was secured by land in Paraguay.[12] Ms. Piper received regular interest payments with a balloon repayment of the original $800,000 investment due in September 2016.[13] She described that investment and others to Ms. Chapman, who was interested in making a short term investment (*i.e.*, one year) at an unusually high rate of return (*i.e.*, 14.5 percent).[14]

In late 2015, Ms. Piper began the process of liquidating

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[9] CP 883-84 (Trial Ex. 27 ¶ 5).

[10] CP 883 (Trial Ex. 27 ¶ 4).

[11] CP 1108-36 (Trial Ex. 385).

[12] CP 1108-36 (Trial Ex. 385); CP 819-23 (Trial Ex. 7, p. 4).

[13] CP 819-23 (Trial Ex. 7, p. 4)

[14] RP Vol. 3, pp. 24:25-26:2 ("Yes. I have a conversation with [Ms. Piper]" about "invest[ing] in a bond that earned 14.5 percent and could be liquidated at any time.")

the Estate's assets so they could be transferred to St. Jude in accordance with Mr. Yates' will.[15] At that point, the Estate's sole non-liquid asset was its interest in the mortgage-backed loan to Mr. Marengo. The undisputed testimony at trial reflected that Ms. Piper acted as the personal representative of the Estate and broker to the Trust, authorizing the sale of the security interest from the Estate to the Trust for $500,000 (known in the industry as selling and purchasing a "position" in a security).[16] Evidence admitted at trial suggests that Ms. Chapman understood this type of transaction.[17] Moreover, financial industry expert Neil Beaton testified that similar transactions (when two or more persons invest together in a single security) frequently occur in the securities industry.[18]

The Trust transferred the $500,000 to Ms. Piper on

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[15] CP 887-97 (Trial Ex. 33).

[16] *See* RP Vol. 9, p. 30:4-7; RP Vol. 3, pp. 107:24-108:4.

[17] CP 820 (Trial Ex. 7, p. 1 ("Remember that you can always sell your position my friend.")).

[18] RP Vol. 9, pp. 119:10-121:18.

September 9, 2015.[19] When this securities transaction occurred (which the Trust and its counsel previously admitted occurred on September 9, 2015 and the jury agreed), the $500,000 payment became the property of the Estate. In turn, the Trust obtained ownership of the securities interest, alongside Ms. Piper. Ms. Piper acknowledged this investment by amending her own will to ensure that Ms. Chapman would recover the funds if Ms. Piper were to pass away while the Paraguayan securities investment was still held in Ms. Piper's name.

Several weeks later, the Estate transferred the funds to St. Jude on October 1, 2015, in accordance with Mr. Yates' will.[20] St. Jude deposited the Estate's funds on October 13, 2015.[21] St. Jude used these funds to "support[] research and treatment to advance cures, and means of prevention, for catastrophic

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[19] CP 627-28; *see also* CP 1324-28 (Trial Ex. 468); CP 1035-36 (Trial Ex. 73).

[20] CP 947-50 (Trial Ex. 49).

[21] CP 204.

diseases affecting children."[22]

B. The investment in the Marengo loan failed.

The Trust and Ms. Piper's high-yield, international investment went south. On October 6, 2015, Ms. Piper learned that the debtor, Mr. Marengo, had not made any interest payments after July 2015.[23] She began to investigate the default while working with the debtor to identify a replacement property he could sell to repay his debt.[24] As the jury heard from testimony by a Paraguayan official, Ms. Piper subsequently discovered the property securing the loan had been fraudulently represented as having clean title when, in fact, it was subject to an overlapping interest that made it impossible for her to quickly foreclose on the property.[25] Ms. Piper stopped advancing interest payments to Ms. Chapman and

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[22] *Id.*

[23] CP 1287-88 (Trial Ex. 176a, p. 3-4).

[24] CP 1300-03 (Trial Ex. 413); CP 1307-09 (Trial Ex. 418).

[25] CP 1304-06 (Trial Ex. 414); RP Vol. II, pp. 22:13-23:11.

informed her of the default in January 2016.[26]

Ms. Chapman initially awaited to see the outcome of Ms. Piper's efforts to enforce their rights in the distressed investment, including reports from Ms. Piper's trip to Paraguay to address the issue.[27]

Then, in 2017, Ms. Chapman retained counsel and filed suit against Ms. Piper, alleging that she had violated the WSSA and had committed fraud and conversion.[28] Based on evidence at trial and shortly before the case was submitted to the jury, the Nguyen Family Trust, by and through its Trustee, Jimmy H. Nguyen, was substituted as plaintiff in place of Ms. Chapman.[29]

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[26] CP 1310-11 (Trial Ex. 424).

[27] RP Vol. 9, pp. 48:23-49:19.

[28] Ms. Chapman also asserted a claim for negligent misrepresentation but dismissed it before trial.

[29] CP 601-02.

C. The jury found that Ms. Piper converted the Trust's funds by completing a fraudulent securities transaction.

Following a four-week trial, in November 2019, the jury entered a verdict against Ms. Piper for all three of the Trust's legal claims.[30]

Securities Claim. The jury agreed that Ms. Piper "employ[ed] a device, scheme or artifice to defraud" "in connection with a sale or purchase of [a] security."[31] For this claim, the jury awarded the Trust $500,000.[32] This finding is consistent with the Trust's admission that a securities transaction occurred.

Conversion Claim. The jury agreed that the Trust had "a property interest in a specific sum of money or property," and that Ms. Piper "willfully interfered with [the Trust's]

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[30] CP 627-30.

[31] *Id.* at 627.

[32] *Id.* at 628.

property interests without justification."[33] For this claim, the jury awarded the Trust the same $500,000 it awarded in connection with the securities claim.[34] Thus, the jury determined that the same act that constituted the conversion claim underpinned the securities claim—*i.e.*, Ms. Piper converted the Trust's funds by wrongfully investing in the Marengo loan instead of investing in a Paraguayan bond (as authorized).

Fraud Claim. The jury finally awarded the Trust $62,500.[35] This represents the amount in interest that the Trust would have received had Ms. Piper invested the funds in the authorized bond investment instead of the Marengo loan.

Pursuant to the WSSA, on July 24, 2020, the Trust moved for an award of attorneys' fees.[36]

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[33] *Id.*

[34] *Id.* at 629.

[35] *Id.* at 630.

[36] CP 1193-1201.

D. The trial court correctly dismissed the Trust's claim for equitable relief.

Based on the jury's verdict and evidence at trial, St. Jude moved for dismissal of the Trust's claim on January 15, 2020.[37] On March 23, 2020, after considering oral argument, extensive briefing, and having presided over the four-week trial, Judge Bassett granted St. Jude's motion and dismissed the Trust's claim.[38] On July 16, 2020, the Trust obtained its judgment against Ms. Piper.[39] The judgment awarded a total principal amount of $562,500.[40] Pre-judgment and post-judgment interest was also awarded: 8 percent per annum on the securities damages ($500,000), and 5.25 percent per annum on the fraud damages ($62,500).[41] The judgment did not separately award post judgment interest on the Trust's

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[37] CP 680-96.

[38] CP 773-75.

[39] CP 776-79.

[40] *Id.*

[41] *Id.*

conversion damages ($500,000), because this would have been duplicative of the post-judgment interest awarded on the WSSA damages.[42] The judgment further invited the Trust to file a petition for attorneys' fees, which were awarded in the amount of $281,372.20, on October 5, 2020.[43]

E. The Court of Appeals affirmed the trial court.

Then, the Trust filed an appeal. Division I of the Court of Appeals affirmed the trial court's dismissal of the equitable claim against St. Jude.[44] Division I rejected the Trust's arguments holding: "Because [the Trust] was provided an adequate remedy at law by way of a jury verdict against Darlene Piper, which was reduced to a judgment after trial, the court did not err in dismissing its claim for equitable relief

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[42] *Id.*

[43] CP 1202-14.

[44] Pet., App. 1 at 1 (*Nguyen Family Trust v. Am. Lebanese Syrian Assoc. Charities, Inc.*, No. 83416-9-I (Wash. Ct. App. May 31, 2022)).

against [St. Jude]."[45] On June 21, 2022, the Trust moved for reconsideration,[46] which the Court of Appeals denied on July 7, 2022.[47]

The Court of Appeals correctly decided the case and the Trust's Petition does not present any basis for further review.

IV. LEGAL AUTHORITY AND ARGUMENT

The Trust fails to meet any of the standards in Rule of Appellate Procedure 13.4(b) for granting a petition for review. Accordingly, this Court should deny the Trust's Petition.

A. The Court of Appeals correctly applied Washington law regarding equitable relief.

The Trust asserts that this Court may accept review because the Court of Appeals' decision conflicts with a decision of this Court.[48] Not so. Division I's opinion is in complete

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[45] *Id.* at 1.

[46] App. 1 (Appellant Nguyen Family Trust's Mot. for Recons., No. 83416-9 (June 21, 2022)).

[47] App. 2 (Order Den. Mot. for Recons., No. 83416-9 (July 29, 2022)).

[48] Pet. at 5.

harmony with this Court's precedents, and the Trust is not entitled to the equitable relief it seeks.

1. The Trust's equitable claim fails because it has an adequate legal remedy.

In deciding this case, the Court of Appeals rested its decision on this Court's precedent: "A court will grant equitable relief only when there is a showing that a party is entitled to a remedy and the remedy at law is inadequate."[49] That is because "an equitable remedy is an extraordinary" form of relief.[50]

In *Sorenson*, a group of lenders sought to recover in equity against a third party. This Court rejected as irrelevant the lenders' argument that the judgment debtor lacked "funds and property to satisfy this judgment."[51] Instead, this Court held that the remedy at law provided by the judgment against the judgment debtor was sufficient, even if the "likelihood of

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[49] Pet., App. 1 at 5-6 (quoting *Sorenson v. Pyatt*, 158 Wn.2d 523, 531 (2006)).

[50] *Id.* at 6 (quoting *Sorenson*, 158 Wn.2d at 531).

[51] *Sorenson*, 158 Wn.2d at 544.

full payment is small."[52] The mere "entry of judgment in favor of the Lender's claimants on the money owed to them by [the debtor] is sufficient evidence that a remedy at law exists."[53] Thus, as a matter of law, equity would not be served by imposing the debtor's burden on the third party.[54]

Here, the Trust's judgment against Piper is an adequate remedy at law, and *Sorenson* is dispositive. The Court of Appeals, relying on this precedent, properly affirmed the trial court.[55]

2. The Trust's case citations do not change the outcome.

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[52] *Id.*

[53] *Id.* at 543-44.

[54] *Id.* at 544.

[55] Pet., App. 1 at 10 ("Because we find [the Trust] has a complete, adequate, and clear remedy at law [against Piper], it is not entitled to an equitable remedy against [St. Jude].").

The Trust argues that certain decisions from this Court support its unjust enrichment claim against St. Jude and justifies review here.[56] The Trust's argument fails.

Rozell

First, *Rozell* involves clear-cut wrongdoing by the defendant whom the court found was unjustly enriched. Defendant Mr. Vansyckle took advantage of the plaintiff because he was elderly and uneducated. Ultimately, Mr. Vansyckle manipulated the plaintiff into conveying 80 acres of valuable property, *without any consideration*, to Mr. Vansyckle.[57] Subsequently and without Mr. Rozell's knowledge or consent, Mr. Vansyckle conveyed the same property by quitclaim deed to his son-in-law, Mr. Gardiner.[58]

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[56] Pet. at 17-21 (citing *Rozell v. Vansyckle*, 11 Wash. 79 (1895) (The Trust's citation incorrectly identifies this case as "*Rozell v. VanDyke*.") and *Viewcrest Co-op. Ass'n, Inc. v. Deer*, 70 Wn.2d 290 (1967)).

[57] *Rozell*, 11 Wn. at 80-82.

[58] *Id.* at 82.

Mr. Gardiner was fully aware of the dubious circumstances by which he was obtaining the property.[59]

The *Rozell* Court concluded that Mr. Gardiner had been unjustly enriched.[60] Citing black-letter law, the Court explained: subsequent holders of fraudulently obtained property may be liable for unjust enrichment if they similarly act in bad faith and with notice of the inequitable circumstances.[61] The Court's holding is inapposite here, where St. Jude was lawfully entitled to the funds it received from the Estate and had no knowledge of Ms. Piper's deception. More, as the Court of Appeals explained, this situation "is unlike conversion of real property, which is considered unique. The damages can also be ascertained with certainty . . ." such that

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[59] *Id.*

[60] *Id.* at 84.

[61] *Id.* at 83-84.

the jury's award against Ms. Piper, for the specific monetary damages the Trust sought, is sufficient.[62]

Aligned with the *Rozell* precedent, in *Pitzer v. Union Bank of California*, 141 Wn.2d 539 (2000), this Court further clarified that some "element of wrongdoing" is necessary to impose any equitable relief, including a constructive trust for unjust enrichment. This Court relied on the general rule of constructive trusts, *i.e.*, that constructive trusts allow courts to prevent the holder of the legal title from retaining a beneficial interest where "in good conscience" he should not.[63] This requirement is also captured by the elements required to prove an unjust enrichment claim: (1) plaintiff "conferred a benefit upon the defendant," without consideration; (2) the defendant had knowledge of this conferral; and (3) it would be unjust for

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[62] Pet., App. 1 at 9-10.

[63] *Pitzer*, 141 Wn.2d at 548.

the defendant to retain the benefit without compensating plaintiff.[64]

Here, St. Jude had absolutely no involvement in the securities transaction between the Trust and the Estate. St. Jude did nothing wrong. St. Jude was lawfully entitled to receive the Estate's funds, because (1) the Trust bought the Estate's interest in the mortgage-backed security, and (2) Mr. Yates bequeathed the remaining assets in his Estate to St. Jude. More, St. Jude did not receive these funds at the Trust's expense because the Trust received an interest in the Paraguayan security in consideration for the $500,000 investment. The evidence at trial showed that that investment defaulted, but in fact still exists in Paraguay.

Viewcrest

The Trust separately cites *Viewcrest*, which is also distinguishable because, again, the defendant retained a benefit

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[64] WPI 301A.02.

with knowledge and without consideration. There, the wrongdoer was a financial manager for plaintiff. He wrote a $5,000 check directly to Mr. Deer, the defendant, from the plaintiff's bank account, in satisfaction of a third-party debt.[65] Mr. Deer drew on this check, and plaintiff received nothing of value in exchange.[66] This Court held, therefore, that Mr. Deer was a "constructive trustee," of the $5,000 because the funds were disbursed "for no consideration . . . ."[67]

Here, the Trust received something of value in exchange for its funds, *i.e.*, a security interest from the Estate. And, unlike Mr. Deer who received a check from the plaintiff's bank account giving him notice of the wrongful payment, St. Jude had no knowledge of any of Ms. Piper's wrongdoing when it received the Estate's bequeathment. More, this Court's opinion in *Viewcrest* does nothing to change the correct analysis of the

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[65] *Viewcrest*, 70 Wn.2d at 291.

[66] *Id.*

[67] *Id.* at 292.

Court of Appeals—that a party who has an adequate legal remedy may not also have an equitable remedy against an innocent third-party.

Because the facts and the Court of Appeals' decision are consistent with this Court's precedent, there is no basis to grant review.

B. The Court of Appeals' decision in *Bailie Communications, Ltd. v. Trend Business Systems* is consistent with a requirement of wrongdoing.

The Trust asserts that this Court may also accept review because the Court of Appeals' decision conflicts with a published decision of the Court of Appeals.[68] The Trust relies on *Bailie Communications, Ltd. v. Trend Business Systems*, 53 Wn. App. 77 (1988). This reliance is misplaced. Indeed, *Bailie* exemplifies why unjust enrichment cannot, as a matter of law, have occurred here.

1. *Bailie* does not bolster the Trust's arguments because it is factually inapposite.

[68] Pet. at 21-26; *see also* RAP 13.4(b).

Contrary to the Trust's suggestion, the *Bailie* case is aligned with the Supreme Court precedent discussed above and is distinguishable from the facts at issue here.

The Bailies possessed a one-third interest in a Hawaiian condominium.[69] The Bailies assigned this interest to defendant Suburban, in exchange for two promissory notes totaling $175,000 in value.[70] Mr. Wosepka personally guaranteed the notes and did so using another defendant, Trend's, letterhead.[71] Mr. Wosepka was effectively Trend's alter-ego, as he was Trend's President and its sole shareholder.[72] Neither Suburban nor Mr. Wosepka made the periodic payments required by the

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[69] *Bailie*, 53 Wn. App. at 78.

[70] *Id.*

[71] *Id.*

[72] *Id.*

notes.[73] On this basis, the Bailies prevailed on their legal claims against Suburban and Mr. Wosepka.[74]

To further profit from their scheme at the Bailies' expense, Suburban and Mr. Wosepka also fraudulently induced the Bailies to co-sign a mortgage for $300,000. They represented that half the mortgage proceeds would be paid to the Bailies in satisfaction of Suburban's debt.[75] Instead, however, all $300,000 of the mortgage proceeds were diverted to Trend.[76]

The *Bailie* court held that that Trend was unjustly enriched because (1) Trend took the mortgage proceeds with notice of Mr. Wosepka's fraud (because Trend was effectively Mr. Wosepka's alter-ego), and (2) Trend did not pay any value

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[73] *Id.*

[74] *Id.* at 79.

[75] *Id.*

[76] *Id.*

for these same proceeds.[77] This is consistent with the analysis in *Rozell* and *Pitzer*.

As applied here, the Trust has not produced evidence (nor could it) that St. Jude was aware of Ms. Piper's wrongful actions. More importantly, the Trust received consideration for its $500,000 investment—the interest in the Marengo loan. That the Marengo loan was a risky investment that failed is of no consequence under *Bailie*.

Likewise, the *Bailie* court lends no support to the Trust's position because the equitable remedy was for a separate and distinct wrong. Specifically, the case was remanded in order to award the plaintiffs a judgment against Trend for $175,000, and therefore to compensate the Bailies for their "lost right in the form of the mortgage proceeds," which was separate and distinct from the value of the promissory notes.[78]

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[77] *Id.* at 85.

[78] *Id.* at 85-86.

2. The Court of Appeals already correctly rejected the same argument by the Trust.

At the Court of Appeals, the Trust made the same argument it does under *Bailie*—that equitable claims can be awarded following an award of legal claims—but it relied on *Columbia State Bank v. Invicta Law Group PLLC*, 199 Wn. App. 306 (2017). As before, the Trust's argument must fail.

The *Columbia State Bank* court upheld an equitable claim, even though the plaintiff had already been awarded an adequate remedy at law for the same damages. But it did so on narrow grounds that do not exist here.[79] First, "the court in Columbia State Bank rooted its analysis narrowly in successor liability," *i.e.*, that the successor entity (whom equitable relief was awarded against) was effectively the alter-ego of the entity that the bank had a legal remedy against.[80]

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[79] *Columbia State Bank,* 199 Wn. App. at 317.

[80] Pet., App. 1 at 7 (citing *Columbia State Bank*, 199 Wn. App. at 317).

This relationship is similar to that found between Mr. Wosepka and Trend in *Bailie*, who were effectively alter-egos of one another. In contrast to the *Bailie* and *Columbia State Bank* defendants, St. Jude is clearly an *innocent* third party with no connection to the wrongdoer. As the Court of Appeals explained: "This is clearly distinguishable from the relationship between [Ms.] Piper and [St. Jude], which were separate entities and whose relationship arose out of a single transaction pursuant to Yates' will."[81]

C. The Trust's inflammatory attempts to mischaracterize St. Jude in its Petition disregards the facts and record in this case.

The Trust's final basis for asserting that this Court should grant review is that there is a substantial public interest at stake.[82]

In furtherance of this argument, the Trust invokes two *criminal* statutes in support of its petition for review: (1) RCW

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[81] *Id.*

[82] Pet. at 26.

9A.56.140, which requires the return of stolen property in one's possession; and (2) RCW 10.79.050, which permits restoration of stolen property.[83] But criminal statutes, as a general matter, have no bearing on civil litigation.[84]

And there is no basis to draw on the criminal statutes here. Indeed, the Trust's arguments regarding criminal law are so untethered from the facts at issue here that this argument is pure distraction. First, the Trust already obtained a *civil judgment* against the wrongdoer, Ms. Piper. Second, the record clearly reflects that St. Jude lawfully received the money from the Estate, and only after the Trust received value for its investment.

Thus, there is no public policy issue for this Court to resolve and the Trust's Petition should be denied.

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[83] *Id.* at 26-28.

[84] *See Priest v. Am. Smelting & Refining Co.*, 409 F.2d 1229, 1232-33 (9th Cir. 1969) (explaining that, under Washington law, it is generally disfavored to use criminal judgments in subsequent civil cases).

V. CONCLUSION

For all of these reasons, the Court should decline to review this case.

I certify that this memorandum contains 4,211 words, in compliance with RAP 18.17(b).

SUBMITTED this 28th day of September, 2022.

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APPENDIX

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COURT OF APPEALS
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Respondent.

APPELLANT NGUYEN FAMILY TRUST'S MOTION FOR RECONSIDERATION

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The Nguyen Family Trust came before this court seeking justice. It received none. The Court's May 31, 2022, Opinion condones and legitimizes a third party's receipt and retention of money obtained through fraud and conversion simply because the rightful owner has obtained (or has the ability to obtain) a money judgment against the thief/ fraudster.

The Court's ruling overlooks long standing case law regarding an owner's right to recover its property via a constructive trust where property obtained by fraud is traced into the hands of someone remote from the original wrongdoer.[1]

Similarly, the Court's ruling overlooks its prior ruling in *Bailie Communications, Ltd. v. Trend Business Systems*, 53 Wn. App. 77, 765 P.2d 339 (Div. 1,1988), applying the Restatement

[1] The Court's Opinion that NFT's claim to recover its $500,000 from St. Jude, whether by unjust enrichment, restitution or imposition of a constructive trust, is barred by NFT's "adequate remedy at law" against Piper for her fraud would negate over 100 years of case law allowing the imposition of a constructive trust against a party remote from the original fraudster.

(First) of Restitution §123, and directing the entry of a judgment for unjust enrichment against a third party who received fraudulently obtained funds, *even though the plaintiffs had already prevailed on legal claims involving liability for the same funds.*

1. Clarification of facts.

Tina Chapman, a Vietnamese immigrant and the settlor and beneficiary of the Nguyen Family Trust (NFT)[2], worked six to seven days a week running a restaurant.[3] She sold the restaurant business and worked to build a house on Bainbridge Island.[4] She then sold the house on Bainbridge Island to purchase a gas station in Gig Harbor.[5] The restaurant, the house, and finally the gas station represented Tina Chapman's

[2] RP. Vol. 2, p. 74; 159
[3] RP Vol. 2, pp. 84, 86.
[4] RP Vol. 2, pp. 105, 119, 146
[5] RP Vol. 2, pp. 82, 90-91

"retirement" fund[6] which was the product of her working six to seven days per week for most of her adult life.

The proceeds from the sale of the Bainbridge Island house were deposited in the NFT's bank account on August 31, 2015.[7] Nine days later, on September 9, 2015, through Darlene Piper's (Piper) fraud[8], $515,000.00 of the house proceeds were then deposited in Piper's IOLTA trust account. $500,000 was to be invested by Piper in bond funds. Prior to the September 9, 2015, deposit of $515,000, Piper's IOLTA trust account only had a balance of $866.76.[9] Piper converted[10] $500,000.00 of NFT's money that she had promised to invest in bonds and paid it to St. Jude in a $528,730.61cashier's check drawn on her IOLTA trust account on October 1, 2015.[11]

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[6] RP Vol. 2, p. 136
[7] RP Vol. IV, p. 29; CP 1137-1139 (EX 475)
[8] CP 627-629 (Verdict Form)
[9] CP 1044-1049 (EX. 77)
[10] CP 627-629 (Verdict Form)
[11] CP 947-950 (EX. 49). CP 1044-1049 (EX. 77)

Once it was learned during the course of the present lawsuit that Piper sent NFT's $500,000.00 to St. Jude as a purported bequest on behalf of an estate Piper was administering, St. Jude was named as a defendant.[12] NFT sued St. Jude as the holder of its $500,000.00 that was obtained through Piper's fraud and conversion and sought the imposition of a constructive trust. In order to establish that a constructive trust against St. Jude was

[12] CR 18, entitled Joinder of Claims and Remedies, encourages the joinder of all claims against all parties involved as follows:

(a) Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, cross claim, or third party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party.
(b) Joinder of Remedies; Fraudulent Conveyances. ***Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action***; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to the plaintiff, without first having obtained a judgment establishing the claim for money. (emphasis added).

appropriate, NFT first had to prove Piper's fraudulent conduct[13], which it did at trial.

This case came before the Court on an appeal of a summary judgment ruling where the facts and inferences are to be construed in the light most favorable to NFT, the nonmoving party.[14] However, in reading the Court's opinion, one would think that Piper actually invested NFT's money. See, e.g. Opinion at page 2: "Piper later admitted that she ultimately directed the money into a mortgage-backed loan despite Chapman not fully understanding the investment." Piper's "admission" was nothing more than Piper's after-the-fact lie she concocted[15] that was hotly contested at trial and that was

[13]See discussions of constructive trusts, infra.
[14] *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012)
[15] In Piper's initial bankruptcy filings that she prepared under the penalty of perjury with the assistance of counsel, Piper asserted that the entirety of the Paraguayan mortgage-backed loan was her own, that she, herself had earned over $92,000 in interest on that loan, and that she herself had provided a gift to St. Jude in the amount of $529,000. CP 803-818 (EX 3). Piper would later

soundly rejected by the Jury's verdict finding NFT proved Piper committed fraud, conversion and a violation of Washington's Securities Act.[16] The jury specifically found that the NFT's $500,000 was converted by Piper.[17]

It is important that the record be clear that there was no investment of the NFT's money by Piper. The Appellant's Opening Brief and the Appellant's reply brief contain a detailed tracing of Piper's misappropriation of $520,000 in Estate funds, her purchase of a $200,000 bond portfolio in her own name, and her later investment of the ($320,000) balance of the Estate funds in the $800,000 mortgage-backed loan to the Paraguayan arms dealer, again in Piper's own name. Thus, the Estate never had any $500,000 or $520,000 interest in the mortgage-backed loan. Piper's own Estate accounting filed with

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change her story as she attempted to dodge liability in the present lawsuit.

[16] CP 627-629 (Verdict Form).

[17] *Id*.

the Court makes no mention of (1) the $520,000 being withdrawn from the Estate account, (2) the investment in bonds and the mortgage-backed loan, (3) the $92,362 in interest earned on the mortgage-backed loan (4) any alleged assignment of Estate investments to Tina Chapman or the NFT.[18]

October 3, 2015, Piper sent Tina Chapman a text message confirming that (i) her money had been wired to Paraguay, (ii) it had been converted to the local currency, (iii) Piper would fly to Paraguay the following week to set up the investments, and (iv) Tina Chapman could withdraw her investments at any time.[19] None of that was true.[20]

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[18] CP 887-897(EX 33- Estate Accounting); CP 803-818 (EX 3 Bankruptcy schedules showing Piper earned $92,362 in Paraguayan business loan interest)

[19] CP 1104-1107 (EX 84)

[20] NFT's money sat in Piper's IOLTA trust account from September 9, 2015, to October 1, 2015, when Piper sent it to St. Jude. It was never wired to Paraguay and converted to the local currency. Piper's statements in her October 3, 2015, text that the Nguyen Trust's money could be withdrawn at any time is

In truth and in fact, two days earlier, on October 1, 2015, Piper sent NFT's $500,000 as part of a $528,730.61 cashier's check to St. Jude, representing it as a bequest on behalf of the Estate.[21]

The monthly interest-only payments on the mortgage back loan had ceased months before in July 2015.[22] In December 2015, to cover the fact that she had not invested the NFT's $500,000 in bonds as she promised to do (or anywhere else for that matter), Piper gave Tina

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inconsistent with any assignment of an interest in the mortgage-backed loan which called for interest only payments for two years, with a balloon payment due in September 2016. Under the terms of the loan, there was no way for the NFT to withdraw its money "at any time" if it had invested in the loan.

[21] *Id*.; CP 947-950 (EX 49). On October 1, 2015, Piper also filed a false Estate Accounting with the Court that omitted Piper's transfer of $520,000 from the Estate bank account in March 2014 that Piper used for her investments in Paraguay. That accounting also omitted any mention of the significant interest Piper had earned with the Estate money- over $92,000 on the mortgage-backed loan, or any mention that the Estate had ever owned an interest in the $800,000 mortgage-backed loan to the Paraguayan arms dealer. CP 887-897 (EX 33).

[22] RP V.4, p. 96.

Chapman a check for $12,500 as "interest" on what turned out to be a nonexistent investment in bonds.[23] That payment was simply to forestall Tina Chapman learning the truth that the NFT's funds had not been invested at all.

During the pendency of this appeal, NFT asked the Court to take judicial notice of Piper's guilty plea wherein she confirmed that NFT's money was never invested by her but instead was sent to St. Jude. That motion was never ruled upon.[24] However, at oral argument, St. Jude continued to argue the same untruth that it asserted at trial under its joint defense agreement with Piper and the same untruth that it repeated fifteen (15) times in its Respondent's Brief—that Piper had invested NFT's money in the mortgage-backed loan. That untruth was rejected by the jury's finding of conversion.

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[23] CP 1032-1034 (EX 72); RP V.2, p. 131.

[24] On February 25, 2022, Commissioner Kanazawa referred ruling on NFT's Motion for Judicial Notice to the panel of judges hearing the appeal.

Piper's August 30, 2021, guilty plea in *United States v. Piper*, CR20-5372JRB which arises from her scheme to defraud and convert NFT's $500,000.00 conclusively establishes that no investment was ever made[25]:

and omissions. The essence of the scheme was as follows: DARLENE A. PIPER misappropriated Estate funds for her own benefit. To cover the misappropriated funds, DARLENE A. PIPER then fraudulently induced T.C. to entrust her with $500,000, which DARLENE A. PIPER stated would be invested on T.C.'s behalf. Instead of investing the $500,000, DARLENE A. PIPER gave the money to St. Jude in lieu of the funds she had misappropriated.

. . .

On October 1, 2015, DARLENE A. PIPER used T.C.'s funds in order to close out the J.H.Y. Estate by causing to be issued to St. Jude Children's Research Hospital Cashier's Check No. 8117, in the amount of $528,730.61, and mailing it from Port Orchard, Washington, to St. Jude Children's Research Hospital in Memphis, Tennessee. DARLENE A. PIPER filed an Estate Accounting in Kitsap County Superior Court in which she falsely claimed that the Estate funds had never left the designated Estate bank account.

On October 3, 2015, DARLENE A. PIPER sent a text message to T.C. in which she falsely and fraudulently assured T.C. that (1) she had wired T.C.'s funds to Paraguay; (2) the funds had been converted to the local currency, and (3) DARLENE A. PIPER planned to fly to Paraguay "next week" to set up T.C.'s investment. In truth and in fact, Ms. Piper had used T.C.'s funds to repay St. Jude's Research Hospital, the money from T.C. was not invested on her behalf, and T.C.'s funds were not returned to her.

[25] The references in the Plea Agreement to "TC" refer to Tina Chapman, the settlor and beneficiary of the NFT.

Taking judicial notice of the guilty plea promotes the purposes of the Rules of Appellate Procedure that the Rules "will be liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a).[26] Justice is not served if a decision is premised on the lie that Piper made an investment for the NFT. Likewise, the Court cannot reach the merits of the case in the absence of the truth.

Taking judicial notice of the guilty plea also promotes the truth-telling requirement of RPC 3.3 regarding candor to the

[26] Applying similar legal precepts to Washington's Rules of Appellate Procedure that normally restrict consideration of additional evidence on appeal, the Fourth Circuit Court of Appeals in *Colonial Penn Ins. Co. v. Coil,* 887 F.2d 1236, 1239 (4th Cir. 1989), in an appeal over an insurance company's fire loss payment pursuant to an offer of judgment, held that homeowners' guilty pleas to being an accessory after the fact to commit arson were proper subjects for judicial notice. *See also Schwartz v. Cap. Liquidators, Inc.*, 984 F.2d 53, 54 (2d Cir. 1993)(holding that it should take judicial notice of the appellant's later conviction for making false statements at the trial court level in the very matter on appeal).

tribunal.[27] St. Jude's counsel was provided with a copy of Piper's Guilty Plea on October 18, 2021, and in NFT's Motion for Judicial Notice filed with this Court on February 2022. St. Jude;s counsel was informed of Piper's sentencing to a federal prison on March 7, 2022. However, at oral argument in this matter, counsel continued to argue that Piper invested NFT's money, contrary to Piper's felony guilty plea, where she was represented by two attorneys, wherein she admitted that no investment had been

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[27] RPC 3.3 requires both truth-telling and the prompt correction of any false statements as follows:

> (a) A lawyer shall not knowingly:
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
> . . . or
> (4) offer evidence that the lawyer knows to be false.
> (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding.
> . . .
> (c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by Rule 1.6

made. Instead, Piper admits that NFT's money was paid to St. Jude.

This case should be decided on the true set of facts—that Piper never invested NFT's money. Successful in her fraud, Piper simply converted NFT's money and paid it to St. Jude.

As stated in the Restatement (Third) of Restitution and Unjust Enrichment §1, the equitable conception of the law of restitution is crystallized by Lord Mansfield's famous statement in *Moses v. Macferlan*, 2 Burr. 1005, 1012, 97 Eng. Rep. 676, 681 (K.B. 1760): "In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

2. Long standing Washington case law allows persons whose property has been obtained by fraudulent conduct to recovery that property in the hands of a subsequent transferee.

A constructive trust arises where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were

permitted to retain it. *Baker v. Leonard,* 120 Wn. 2d 538, 548, 843 P.2d 1050 (1993) *(citing* Proctor v. Forsythe, 4 Wn. App. 238, 242, 480 P.2d 511 (1971); Thor v. McDearmid, 63 Wn. App. 193, 206, 817 P.2d 1380 (1991)).

Since 1895, Washington courts have recognized the rights of parties whose property has been obtained by fraud or misrepresentation to trace their property and recover their property by means of a constructive trust, even if the property has been transferred from the original wrongdoer to a subsequent holder. *See. Rozell v. VanDyke*, 11 Wash. 79, 39 P. 270 (1895). In *Rozell*, our Supreme Court quoted from 2 Pom. Eq. Jur. § 1053 as follows:

> In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means, or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, **equity impresses a constructive trust on the property thus acquired**

> **in favor of the one who is truly and equitably entitled to the same**; *** **and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder**, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust." We think that the transaction falls squarely within the purview of this authority, and that the rule laid down by Pomeroy has been generally adopted, and received the sanction of the courts without exception.

Rozell, 11 Wash. at 83-84 (emphasis added).

Thus, the rule first announced in *Rozell* allows the true owner of property that has been lost through the fraudulent conduct of another to trace and recover their property, even if it has been transferred to a subsequent holder, by means of a constructive trust, as long as the subsequent holder is not a purchaser for value and without notice of the true owner's rights.

This same rule, protecting the property rights of a rightful owner whose property was lost through fraud or misrepresentation by means of a constructive trust that may be

imposed against subsequent transferees, was reaffirmed by our Supreme Court throughout the 20th century. *See e.g. Kausky v. Kosten*, 27 Wn. 2d 721, 727–28, 179 P.2d 950 (1947)(quoting same rule of law from Pomeroy's Equity Jurisprudence, 5th Ed., Vol. 4, page 119); *See also Baker v. Leonard,* 120 Wn. 2d 538, 843 P.2d 1050 (1993)(the rule allowing constructive trust announced, but the remedy of a constructive trust was denied in the absence of any evidence of fraud or undue influence.)

In the 1967 case of *Viewcrest Co-op. Ass'n, Inc. v. Deer*, 70 Wn.2d 290, 293, 422 P.2d 832 (1967), our Supreme Court explained Washington's long history of allowing constructive trusts to recover misappropriated property as follows:

> It is not required, in order to impose a constructive trust, that the plaintiff must prove that he was deprived of his property through acts constituting actionable fraud. We adopted the following rule from 4 Pomeroy, Equity Jurisprudence s 1053 as early as 1895 in *Rozell v. Vansyckle*, 11 Wash. 79, 39 P. 270, and reiterated it as recently as 1961 in *Bangasser & Assoc., Inc. v. Hedges*, 58 Wn.2d 514, 516, 364 P.2d 237, 239:
> "In general, whenever the legal title to property, real or personal, has been obtained through actual

> fraud, misrepresentations, concealments, or through undue influence, duress, Taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same; * * * **and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right** * * *."
>
> This court has often held that a constructive trust was a proper remedy upon factual situations which constituted something less than actionable fraud. See, *In re Yiatchos' Estate*, 60 Wn.2d 179, 373 P.2d 125 (1962); *Watkins v. Gorlick*, 52 Wn.2d 95, 323 P.2d 649 (1958); *Kausky v. Kosten*, 27 Wn.2d 721, 179 P.2d 950 (1947); *Dexter Horton Building Co. v. King County*, *10* Wn.2d 186, 116 P.2d 507 (1941); and *Seventh Elect Church in Israel v. First Seattle Dexter Horton National Bank*, 162 Wash. 437, 299 P. 359 (1939).

(emphasis added).

Implicit in the jurisprudence allowing a rightful owner to recover property via a constructive trust imposed upon a subsequent holder who is removed from the original fraudster, is

the principal that the wronged party is not limited to only an action at law against the fraudster as an "adequate remedy." In every case where money has been obtained by fraud, the defrauded party has the right to sue the fraudster. Limiting a defrauded party's rights to a legal action and judgment against the fraudster, as this Court has done in its May 31, 2022, Opinion, eviscerates long standing case law allowing the rightful owner to trace and recover its property through a constructive trust, even if that property is transferred to a remote holder.

It is beyond dispute that $500,000 deposited in Piper's IOLTA trust account on September 9, 2015, was NFT's property[28] that was then converted by Piper. St. Jude received

[28] "[t]here is nothing in the nature of money making it an improper subject of [conversion] so long as it is capable of being identified, as when delivered at one time, by one act and in one mass, or when the deposit is special and the identical money is to be kept for the party making the deposit, or when wrongful possession of such property is obtained." *Brown ex rel. Richards v. Brown*, 157 Wn. App. 803, 818, 239 P.3d 602, (2010) (quoting *Westview Invs.*, 133 Wn. App. at 852, 138 P.3d 638 (alterations in original) (internal quotation marks omitted) (quoting *Davin v. Dowling*, 146 Wash. 137, 140–41, 262 P. 123

NFT's $500,000 as a result of Piper's fraud and conversion. St. Jude paid nothing for that wrongful gift/receipt of NFT's money. Equity and justice require that St. Jude return NFT's property. This Court should reconsider and direct the entry of a constructive trust against St. Jude for NFT's $500,000.

3. The Restatement (First) of Restitution should be applied and the case of *Bailie v. Trend* should be followed that allowed an equitable remedy against a party who received funds as the result of fraud, even though the plaintiffs had already prevailed in their legal claims against the parties that defrauded them.

a. This Court's ruling in *Bailie v. Trend* provided plaintiffs with an equitable remedy even though the plaintiffs had already prevailed on their legal claims.

In *Bailie Communications, Ltd. v. Trend Business Systems*, 53 Wn. App. 77, 765 P.2d 339 (Div. 1,1988), this Court applied the Restatement (First) of Restitution

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(1927)). *See also* CP 603-626 (Court's Instructions to the Jury at Instruction No. 7 re conversion of money)

§123 and it directed a judgment for unjust enrichment against a third party who received ill-gotten funds, despite the fact that the plaintiffs had already prevailed against other defendants on contractual claims.

In *Bailie,* the Bailies executed a contract assigning their one-third interest in a Hawaiian condominium to Suburban Investment Corporation. Suburban agreed to pay the Bailies $175,000 for the assignment. Harold T. Wosepka, president of Trend Colleges, Inc., guaranteed Suburban's payment obligation. *Id.* at 78.

Suburban could not pay the installment when it became due. However, Suburban and Wosepka assured the Bailies that the Bailies would receive $175,000 from the proceeds of a new $300,000 mortgage of the condominium if the Bailies would co-sign Suburban's mortgage, which they did. However, none of the $300,000 loan proceeds were paid to the Bailies. Instead,

Wosepka put all of the money in Trend Colleges, Inc. *Id.* at 78-79.

The Bailies sued Suburban and Wosepka, as well as Trend Colleges which was the ultimate recipient of the loan funds that were obtained by fraud. At trial, the Bailies prevailed against Suburban on the condominium assignment contract, and prevailed against Wosepka on his guaranty. However, the trial court dismissed the Bailies' claim against Trend Colleges. *Id.* at 79.

On appeal, the Court of Appeals reversed the trial court's dismissal of Trend Colleges. The Court began its analysis with a statement that "[e]ven third parties who innocently acquire property must sometimes surrender it if the property was fraudulently obtained," *Id.* at 85 (citing the Restatement of Restitution § 123 (1937)) The Court in *Bailie* further noted that a person's receipt and retention of monies obtained by the fraud of a third person results in unjust enrichment when the recipient

did not pay value for any of funds it received, again citing the Restatement of Restitution § 123. *Id.*

Accordingly, the Court found that Trend Colleges had been *unjustly enriched* by its receipt of the loan proceeds that were obtained by fraud. The Court found that Trend's enrichment was unjust "for two alternative reasons."

> First, Trend received and retained the proceeds of fraud knowing of the Bailies' rights. Trend knew of the fraud through Wosepka because Wosepka was Trend's president and sole shareholder. See 3 W. Fletcher, Private Corporations §§ 796, 799 (rev. ed. 1986). **Second, Trend did not pay value for any of the mortgage proceeds. Either of these reasons[29] makes Trend's otherwise lawful acquisition and retention of the proceeds unjust.** See Restatement of Restitution § 123.

Id. at 85 (emphasis added).

Consequently, despite the fact that the Bailies had prevailed on their actions at law for breach of the

[29] Thus, whether or not Trend knew of the fraud or not, the simple fact that it paid nothing for the fraudulently obtained mortgage proceeds was sufficient to render its retention of the proceeds unjust.

assignment agreement against Suburban, and on their claim on Wosepka's guarantee, this Court held that a judgment for unjust enrichment in the amount of $175,000 should be entered against Trend Colleges based on its receipt of the fraudulently obtained loan proceeds that were earmarked for the Bailies. *Id.* [30]

Under the holding of *Bailie*, the fact that NFT prevailed on its legal claims against Piper for fraud, conversion and violation of Washington's Securities Act does not prevent the entry of judgment for unjust enrichment against St. Jude, just as was done in *Bailie.*

[30] The fact that *Bailie* was decided eight years before the *Sorenson v. Pyeatt* decision is immaterial. The general statement in *Sorenson* that equitable relief is available only if there is no adequate legal remedy, was already a general statement of the law in Washington. *See e.g. Tyler Pipe Indus., Inc. v. Department of Rev.*, 96 Wn.2d 785, 791, 638 P.2d 1213 (1982) and *Orwick v. City of Seattle*, 103 Wn. 2d 249, 252, 692 P.2d 793 (1984). The *Sorenson v. Pyeatt* decision did not change the law.

The fact that St. Jude, like Trend Colleges, paid no value for the funds it received, makes St. Jude's retention of NFT's funds unjust.

b. Section 123 of the Restatement (First) of Restitution as applied by the Court in *Bailie* applies directly to the facts of this case.

The Court misapprehends NFT's arguments and citations to the first and third Restatements of Restitution. It is understood that the Restatements are not binding authorities on this Court. However, the Restatements do provide a reasoned basis upon which the Court can rely to reach a just result in this case.

Section 123 of the Restatement (First) of Restitution, that the Court applied in its decision in *Bailie*, fits the facts of this case perfectly.

Section 123 of the Restatement (First) of Restitution provides as follows:

> **§123 BONA FIDE TRANSFEREE WHO IS NOT A PURCHASER FOR VALUE.**
>
> A person who, non-tortiously and without notice that another has the beneficial ownership of it, acquires property which it would have been wrongful for him

> to acquire with notice of the facts and of which he is not a purchaser for value is, upon discovery of the facts, under a duty to account to the other for the direct product of the subject matter and the value of the use to him, if any, and in addition, to:
>
> a) return the subject matter in specie, if he has it;
> b) pay its value to him, if he has non-tortiously consumed it in beneficial use;
> c) pay its value or what he received therefor at his election, if he has disposed of it.
> *Comment:*
> *a. The rule stated in the Section is applicable to a person who, by gratuitous grant, by will or by descent, has received the title to property, either real or personal, in which another has beneficial ownership of which the transferee has no notice at the time of the receipt . . .*

The Restatement (First) of Restitution § 123 (1937).[31]

As stated in comment (a) to the Restatement, this particular section applies to innocent recipients of property that is beneficially owned by another, and who have not paid value for the property received, *including those receiving property under a will.*

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[31] The current Restatement (Third) of Restitution and Unjust Enrichment (2011) §41, titled "Misappropriation of Financial Assets," compels the same result that misappropriated funds should be returned to the victim as follows: "A person who obtains a benefit by misappropriation of financial assets, or in consequence of their misappropriation by another, is accountable to the victim of the wrong."

The jury's verdict of conversion conclusively establishes that NFT was the rightful owner of $500,000 deposited into Piper's IOLTA trust account. Clear tracing of funds shows that NFT's money was paid to St. Jude on October 1, 2015.[32] St. Jude paid nothing for its receipt of NFT's money. Under Section 123 of the Restatement, St. Jude should be required to account to NFT and return its money.

4. NFT has no adequate remedy at law for a return of its property.

In assessing whether a party as an adequate remedy at law, Courts look to the likelihood of whether a money judgment will actually be paid to determine whether a money judgment is truly an adequate remedy.

In *Klitten v. Stewart*, 125 Wash. 186, 189–90, 215 P. 513 (1923), our Supreme Court analyzed whether a decree of

[32] CP 1044-1049 (EX 77 IOLTA bank statement); CP 947-950 (EX 49 cashier's check to St. Jude).

specific performance regarding a contract to encumber personal property was proper when the plaintiff had the ability to recover in an action at law in the form of a judgment for breach of contract. There, the Court looked to see whether a money judgment was an adequate remedy, based on whether there would likely be a recovery on such a judgment, stating as follows:

> The remedy of an action at law was undoubtedly ample, in the sense that the respondents could have obtained a judgment for a breach of the contract; **but recovery upon the judgment is as essential to make the remedy at law adequate as is the right to obtain the judgment**, and, as to this latter essential, the remedy at law was not in this instance ample.

Id. at 190 (emphasis added).

The Court in *Klitten* found that the equitable relief of specific performance was appropriate when the complaint alleged that any judgment against the appellant "would be worthless" and when the appellant had no other visible property than the property she obtained from the plaintiff. *Id.* at 189.

Similarly, in Columbia State Bank v. Invicta L. Grp. PLLC, 199 Wn. App. 306, 316, 402 P.3d 330 (Div. 1 2017), this Court affirmed the trial court's finding that the bank's legal remedy of foreclosure was inadequate based on the amount of the debt owed because the collateral was essentially worthless.

There is little left to speculation that Piper will never pay NFT's judgment against her. After this lawsuit was commenced in July 2017 seeking recovery of NFT's $500,000, Piper's first reaction was to file bankruptcy on August 30, 2017. On September 22, 2017, Piper filed a schedule of her worldly assets. She did not own a car. She did not own a house. The combined value of her personal property and her financial assets totaled $986.[33]

In its Opinion, this Court concludes that the fact that NFT obtained a significant money judgment against Piper is evidence that an adequate remedy at law exists. Unfortunately, obtaining a

[33] CP 803-818 (EX. 3- Bankruptcy schedules)

judgment against Piper was nothing more than a pyrrhic victory. Following the trial, Piper was indicted in federal court for her fraud in obtaining NFT's (Ms. Chapman's) money and using it to pay St. Jude. She pleaded guilty to the fraudulent scheme and is currently serving an 18-month sentence.[34] Piper had already given up her law license and therefore will not work again as an attorney. Unsurprisingly, therefore, the money judgment remains unpaid.

Given the fact that Piper is now in prison for her theft and fraud, it is unlikely NFT will ever collect its stolen money from Piper. Plainly, a judgment against Piper is not an "adequate remedy" against St. Jude, when NFT's converted property remains in the hands of St. Jude. As a matter of law and equity,

[34] Although Piper's guilty plea occurred after the trial, and therefore, is not in the record, this is public knowledge and has been reported in the paper. *See "Former Kitsap Lawyer gets 18 months for ripping off friend in scheme involving St. Jude's, arms dealer," Kisap Sun, March 14, 2022 [*Former Kitsap lawyer gets 18 months for ripping off friend in scheme involving arms dealer (kitsapsun.com)]

St. Jude should not be allowed to retain NTF's stolen money. The Court should reconsider.

5. NFT's equitable claims against St. Jude are not foreclosed by its legal claims against Piper when Courts have the power to grant relief in both law and equity, even when plaintiffs have already prevailed on legal claims.

A number of cases, including cases from Division 1 of the Court of Appeals, recognize that simply because legal claims are asserted, a Court may still grant equitable relief as the circumstances dictate.

In *Yount v. Indianola Beach Ests., Inc*., 63 Wn. 2d 519, 524–25, 387 P.2d 975 (1964), our Supreme Court affirmed a trial court's judgment, applying both law and equity in the same case, to arrive at a just result between the parties. The rule that a court may grant relief in both law and equity was also recognized by the Court of Appeals, Division 3, in *GMB Enterprises, Inc. v. B-3 Enterprises, Inc.*, 39 Wn. App. 678, 687,

695 P.2d 145 (1985)("A court may grant relief in both law and equity").

In this Court's decision in *Bailie Communications, Ltd. v. Trend Business Systems, supra,* 53 Wn. App. 77, 765 P.2d 339 (Div. 1,1988), the Court reversed the trial court's dismissal of plaintiffs' claims against Trend College and directed a judgment for unjust enrichment against Trend College, the entity that received funds based upon the fraud of two co-defendants, *even though the plaintiffs had already prevailed in their contractual claims against the co-defendants.*

That a court has the power to provide both equitable and legal relief in the same case was again recognized by this Court in *Columbia State Bank v. Invicta L. Grp. PLLC*, 199 Wn. App. 306, 316, 402 P.3d 330, 336 (Div. 1 2017). In *Columbia,* the bank sued a borrower, a defunct PLLC, and its former principal, Jordan, for a debt. The bank obtained summary judgment on its claim against the PLLC. *Id.* at 315. Despite prevailing on its

legal claim, the bank was also awarded equitable relief in the form of successor liability against Jordan. *Id.*

Thus, in *Bailie* and in *Columbia*, this Court allowed both a legal remedy and an equitable remedy to provide adequate relief to reach funds and assets in the hands of subsequent transferees. The same result should apply to NFT's claims against St. Jude.

6. Conclusion

The Court of Appeals should reconsider its May 31, 2022, Opinion. The Trial Court's grant of Summary Judgment in favor of St. Jude should be reversed, and a constructive trust should be imposed against St. Jude for the NFT's $500,000 that it received based on Piper's fraud and conversion .

Certificate of Compliance.

I hereby certify pursuant to RAP 18.17(b) that the foregoing Motion for Reconsideration contains 5974 words.

RESPECTFULLY SUBMITTED this 21st day of June 2022.

GALLAGHER LAW, PLLC

*s/ Thomas F. Gallagher*_____

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Declaration of Service

1. On June 21, 2022, I served a copy of the above Appellant's Motion for Reconsideration to the following:

Washington State Court of Appeals Division Two 950 Broadway, Suite 300 Tacoma, WA 98402	X Washington State Appellate Courts' Portal
Neil Dial, WSBA No. 29599 Eisenhower Carlson, PLLC 1201 Pacific Avenue, Suite 1200 Tacoma, WA 98402 *NDial@eisenhowerlaw.com* *KKardash@eisenhowerlaw.com*	X Via Email Pursuant to the Parties' E-Service Agreement
David P. Horton, WSBA No. 27123 Templeton Horton Weibel, PLLC 3212 NW Byron Street, Suite 104 Silverdale, WA 98383 *dhorton@kitsaplawgroup.com* *tracey@kitsaplawgroup.com*	X Via Email Pursuant to the Parties' E-Service Agreement
Tyler L. Farmer, WSBA No.39912 Harrigan Leyh Farmer & Thomsen, LLP 999 Third Avenue, Suite 4400 Seattle, WA 98104 Phone: (206) 623-1700 *tylerf@harriganleyh.com* *erinf@harriganleyh.com* *conniej@harriganleyh.com*	X Via Email Pursuant to the Parties' E-Service Agreement

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

DATED this 21st day of June 2022, at Tacoma, Washington.

Alison Landry
Paralegal to Thomas F. Gallagher
417 S. G Street
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GALLAGHER LAW, PLLC

June 21, 2022 - 3:11 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	83416-9
Appellate Court Case Title:	Nguyen Family Trust, Appellant v. Darlene Piper et al., Respondents
Superior Court Case Number:	17-2-01435-6

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Filing on Behalf of: Thomas F Gallagher - Email: tom@tgallagherlaw.net (Alternate Email: tom@tgallagherlaw.net)

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FILED
7/29/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

NGUYEN FAMILY TRUST by and through its TRUSTEE JIMMY H. NGUYEN, Appellant, v. AMERICAN LEBANESE SYRIAN ASSOCIATED CHARITIES, INC., a Foreign Nonprofit Corporation, doing business as ST. JUDE CHILDREN'S RESEARCH HOSPITAL, Respondent, DARLENE PIPER, a single individual, Defendant.	No. 83416-9-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Nguyen Family Trust, filed a motion for reconsideration of the opinion filed on May 31, 2022. A majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

For the Court:

Judge

CERTIFICATE OF SERVICE

I, Florine Fujita, declare that I am employed by the law firm of Harrigan Leyh Farmer & Thomsen LLP, a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On September 28, 2022, I caused a true and correct copy of the foregoing document to be served on the parties listed below in the manner indicated:

Neil Dial Eisenhower Carlson, PLLC 1201 Pacific Ave., Ste 1200 Tacoma, WA 98402 NDial@eisenhowerlaw.com	☐ Legal Messengers ☐ First Class Mail ☐ Via Facsimile ☒ WA Appellate Courts' Portal
Thomas Gallagher Gallagher Law, PLLC 417 South G Street Tacoma, WA 98405 tom@tgallagherlaw.net	☐ Legal Messengers ☐ First Class Mail ☐ Via Facsimile ☒ WA Appellate Courts' Portal
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DATED this 28th day of September, 2022.

s/ Florine Fujita
Florine Fujita, Legal Assistant
florinef@harriganleyh.com

HARRIGAN LEYH FARMER & THOMSEN LLP

September 28, 2022 - 3:50 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,219-5
Appellate Court Case Title:	Nguyen Family Trust v. St. Jude Children's Research Hospital, et al.
Superior Court Case Number:	17-2-01435-6

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