NO. 46337-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Estate of:

CHARLES ROBERT THORNTON,

Deceased

APPELLANT MARTIN THORNTON'S REPLY BRIEF

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I. APELLANT'S RESPONSE TO RESPONDENT'S "INTRODUCTION"

Marty believes that the Court can synthesize the appropriate facts of the case without the assistance of a lengthy "rebuttal" Introduction. Marty simply respectfully requests that the Court focus on those "facts" which are supported by the record on appeal. With particular respect to the reference that Charles (the Decedent) and Ms. Heberlein established joint bank accounts for several years prior to Charles's signature of the October 2010 Will, little if any, explanation is provided as to whether those accounts were established for business purposes or personal purposes. As the evidence shows and as Ms. Heberlein repeatedly states, she and Charles were business partners. Martin simply asks the Court to consider that between 1988 and until approximately 40 days before his death, Charles never changed his Will and Martin was his sole beneficiary under his Will. Charles and Ms. Heberlein never married and the concept of becoming registered domestic partners only arose simultaneous to the "marathon" session in which an extremely ill Charles signed a Will changing a 20 year old estate plan.

II. APPELLANT'S RESPONSE TO RESPONDENT'S "RESTATEMENT OF ISSUES ON APPEAL"

As the Court is aware, Martin set forth approximately three issues pertaining to his Assignments of Error. Ms. Heberlein chooses to reframe the issues in language which she believes is more persuasive to her position in the case. However, at the end of the day, the issues remain the same: whether the trial court erred in its grants of summary judgment dismissing the will contest and applying the statute of limitations found in RCW 11.11.070(3). The Court can clearly decipher the issues related to Martin's Assignments of Error without further debate about the appropriate phraseology of the same.

III. REPLY TO "RESTATEMENT" STATEMENT OF THE CASE

Ms. Heberlein does not appear to dispute that Martin is the only child of Charles; that Charles validly executed a Will on March 11, 1988, in which he bequeathed is entire estate to Martin or that Charles's 1988 Will remained in place until five weeks before Charles died. Ms. Heberlein does state as a "fact" that her relationship with Charles "constituted a committed intimate relationship." *Br. of Resp't* at 3. There is no citation to the record for that "fact" and the trial court did not make a legal determination that Ms. Heberlein's relationship with the Decedent was a "committed intimate relationship."

This is but one example of Ms. Heberlein's approach to litigating this case. The parties obviously have set forth their own versions of the applicable facts to this matter. In order to preserve some semblance of judicial economy, Martin believes that this Court can determine the salient facts that apply to the legal analysis of Martin's appeal without further finger-pointing. Again, the Court's analysis of the facts is not merely to compare one set of facts to another, but to view the facts in the light most favorable to Martin who was the non-moving party on summary judgment. When those facts are appropriate viewed, it cannot be denied that:

1. The execution of the October 2010 Will was done in a marathon like session with the attorney according to Ms. Heberlein's own words and during a time that Charles was suffering from the physical effects of metastatic kidney cancer;

2. Martin was cut off of contact with his father during the time that the October 2010 Will was executed; and

3. The purported reasons for the new Will were wholly incorrect.

Viewing the facts in the light most favorable to Martin, the Personal Representative's explanations for the change of the 22 year estate plan were not facts at all and wholly incorrect. At a minimum, the factual dispute between the parties should have prevented entry of summary judgment.

Moreover, contrary to the Personal Representative's assertion that Martin was gifted a residence by his father, the facts are that Martin and his wife Irma purchased the house. It was not a gift. CP 396-404. The substantial amount of litigation at the trial court over this issue establishes that Martin is correct.

IV. REPLY TO RESPONSE ARGUMENT

A. Standard of Review.

There appears to be no dispute regarding the standard of review. Contrary, however, to Ms. Heberlein's assertions, Martin takes the position that he has presented evidence to support his claims including that the Will was the subject of fraud because the purported reasons for the execution of the Will are incorrect. Ms. Heberlein's theory of the case would require Martin to prove a negative.

B. The trial court did, in fact, apply the incorrect standard of review.

First and foremost, Ms. Heberlein asserts that Martin's argument that the trial court applied the incorrect standard of review is "speculation." Br. of Resp't at 13. However, as Martin pointed out in his brief, it was Ms. Heberlein who suggested to the trial court that it should apply a "clear, cogent and convincing" evidence standard. CP 42-66; *Motion for Summary Judgment* at 20. This was directly contrary to Washington law.

Ms. Heberlein asserts that the Martin's argument in this regard, "fails to recognize the established principle that for a claim of undue influence, the court, while still viewing the facts and inferences in the light most favorable to the non-moving party, does consider the higher burden." *Br. of Resp't* at 13. Ms. Heberlein cites to the *Estate of Jones* case as support for this proposition.

It is clear that Ms. Heberlein's reliance on the *Estate of Jones* case for this proposition is, at best, misplaced and, at worst, an attempt to divert the Court from analyzing the appropriate case law on the issue. Even the block quote relied upon by Ms. Heberlein from *Estate of Jones* does not address the issue. *Br. of Resp't* at 14. The *Estate of Jones* case relied upon by Ms. Heberlein is a case from Division Three of the Court of Appeals. *Estate of Jones*, 170 Wn. App. 594, 287 P.3d 610. In coming to the conclusion that the guiding principles of summary judgment are "supplemented" by two other principles, Division Three cited to one of its own cases, *In re Melter*, 167 Wn. App. 285, 273 P.3d 991 (2012). Notably, *In re Melter* was a case that went to trial. *Id* Ms. Heberlein also cites to this Court's decision in *Kitsap Bank v. Denley*, 177 Wn. App. 559, 312 P.3d 711 (2013) as support for this same proposition. *Denley* was decided on November 5, 2013, almost a year after the trial court in this case granted Ms. Heberlein's motions for summary judgment. The law set forth in *In re*

Melter was not the law of Division II at the time of the hearings on Ms. Heberlein's motions for summary and forcing that standard in this case unduly prejudices Martin in both the underlying litigation and on appeal of said litigation. If anything, this is an additional reason for reversal of the trial court's grant of summary judgment and for remand to allow Martin to litigate the case in light of the new standards created by Division Three and Division Two.

Moreover, the standards created by Division Three and Division Two are contrary to the standard on the same issue set forth by Division One of the Court of Appeals. In *Estate of Lennon v. Lennon*, Division One of the Court of Appeals, reversed a trial court's grant of summary judgment in an action to obtain certain funds a decedent's stepson obtained after he sold decedent's stock. In reversing summary judgment, Division One of the Court of Appeals stated:

> Roger [stepson] will bear the heavy burden at trial of proving that a gift occurred by clear, cogent, and convincing evidence. **However, this standard is not applicable for purposes of summary judgment. Rather, the nonmoving party "is entitled to all favorable inferences that may be deduced from the varying affidavits." Consequently, we hold that Roger has introduced sufficient evidence to create a genuine issue of material fact for trial on this issue.**

Id. (citations and footnoted omitted, emphasis added).

If anything, it is not clear what standard the trial court applied to the Motion for Summary Judgment to dismiss Martin's will contest claims and in the abundance of fairness to Martin, he ought to be afforded the opportunity to litigate the case under the appropriate standard. Moreover, it appears now that there is a conflict between the divisions as to the appropriate standard to be applied when a trial court analyzes a motion for summary judgment involving will contest claims.

Ms. Heberlein next asserts that the "plenary powers" of TEDRA is another guiding principal "supplementing the summary judgment standard." *Br of Resp't* at 15 (citing *In re Revocable Trust of McKean*, 144 Wn. App. 333, 343, 183 P.3d 317 (2008)). However, *McKean* did not involve a summary judgment proceeding on a will contest. In *McKean*, this Court held that TEDRA's grant of plenary powers to the trial court, "lends additional support to the trial court's authority to appoint Commencement Bay as Trustee." *Id.* *McKean* had nothing to do with dismissal of actual claims and under Ms. Heberlein's theory in this regard, the trial court would be free to dismiss claims whenever it wanted to and on whatever basis it wanted to. Ms. Heberlein did not advance this theory in her Motion for Summary Judgment so this is a new theory raised for the first time on appeal. It should not be considered by this Court as a result. Ms. Heberlein chose the Motion for Summary Judgment vehicle pursuant to CR 56 and the rules that apply at the time of the motion and the order should be the rules that govern the decision.

C. Under the appropriate standard which should have been applied by the trial court, summary judgment was improper. The presumption of undue influence applies and bars summary judgment dismissal of Marty's claims of undue influence and fraud in the inducement.

Ms. Heberlein does not deny the existence of the presumption of undue influence in Washington law and when viewing the facts that had been adduced at the time of the summary judgment proceedings in this matter, the presumption should have been applied in order to defeat the motion for summary judgment and proceed to trial. Here, there can be no dispute that a confidential or fiduciary relationship existed between Ms. Heberlein and Charles; that Ms. Heberlein participated in the marathon like session transaction that ultimately produced the October, 2010 Will and that Ms. Heberlein received an unusually large part of the estate given that she received the entirety of the estate after 20 plus years of an estate plan providing the entire estate to Martin.

1. Ms. Heberlein does not address her "almost" admission that she occupied a fiduciary relationship to Charles.

The Brief of Resp't does not address Ms. Heberlein's tacit admission of a confidential relationship that because Ms. Heberlein attempted to manipulate the system to obtain what she wanted. When she advanced her claims regarding meretricious relationship or "omitted spouse," she was certain she had a "confidential relationship" with Charles. *Motion for Summary Judgment* at 20. However, when it comes to considering whether she occupied a fiduciary relationship to Charles

Thornton for purposes of imposing the presumption of undue influence, Ms. Heberlein asserts, without any legal support, that her fiduciary relationship be discounted because "anyone with a close personal or business relationship would fall within the definition." Ms. Heberlein does not address that Washington law does not recognize a "discounted" fiduciary relationship.

The undisputed facts that are to be viewed in a light most favorable to Martin are that Ms. Heberlein was Charles's attorney-in-fact pursuant to a power of attorney, CP 170-234, and had to assist him in even writing checks. *Id.*

Ms. Heberlein denies participating in the procurement of Charle's October, 2010 Will both factually and legally, but the evidence, especially when viewed in a light most favorable to Martin, says otherwise. She accompanied Decedent to the attorney's office. She also filled out the entire informational form for Charles, CP 170-234, there was never any advice by the attorney to Charles that representing both he and Ms. Heberlein may be a conflict of interest nor was there any waiver of any conflict of interest signed. Moreover, it is inconceivable that Ms. Heberlein would, in one breath, describe the session in which the Will was executed as a marathon like session if she did not participate in it. People who do not run marathons do not complain that watching one was exhausting.

Ms. Heberlein's constantly changing story about her version of the facts also establishes her participation. She first claimed Charles told the attorney that he did not want Martin to be Personal Representative.

CP 17-41. During her deposition, she stated she was not in the room when the attorney had discussions with Decedent about his estate plan. CP 170-234. These differences and the faulty explanation by Ms. Heberlein which contradicts Ms. Hossanah's description of events is wholly insufficient to overcome the facts presented by Martin. Recall that Martin was totally excluded from Charles by Ms. Heberlein during this operative period of time.

Ms. Heberlein denies she received an unnaturally large portion of the Estate. *Br. of Resp't* at 22-26, and the allegations about Charles's co-mingling of assets (bank accounts) since 2003 is simply unilateral evidence that was presented at summary judgment. Until Ms. Heberlein's deposition, Martin had been led by Ms. Heberlein to believe that there were no such bank accounts and the lines between professional relationship and personal relationship seem to be blurred. With respect to the challenge to the Will which is what this case was about, it was within the course of the 40 days prior to Decedent's passing and while he was suffering from the effects of metastatic kidney cancer, headaches, shortness of breath, fatigue in the afternoons and coughing up blood, that Decedent's only son was completely eliminated from his father's estate plan. This was done while Ms. Heberlein excluded Martin from his father.

Obviously, the late change Will substantially increased Ms. Heberlien's interest in the Estate. Ms. Heberlein went from 0% to 100% of estate assets in one long day that "seemed like an eternity" to her

and she was not the one suffering from metastatic kidney cancer. Ms. Heberlein couldn't get done fast enough as far as she was concerned.

2. *Ms. Heberlein's analysis of the "remaining factors" regarding undue influence do not warrant affirmation of summary judgment*

Ms. Heberlein's analysis makes it sound as though Charles was doing great but for the diagnosis of a cancer that killed him approximately a month after he signed the subject Will. *Br. of Resp't* at 26-29. The ravages of an insidious disease like cancer substantially vary from person to person. While discovery was not complete before Ms. Heberlein filed her motion for summary judgment, the facts adduced to date support a conclusion that summary judgment was not appropriate. Even before the Will was signed, Charles was experiencing daily headaches, shortness of breath and coughing and beginning on October 1, 2010, he was coughing up blood. These are not the type of facts that support a finding of mental and physical condition conducive to changing an estate plan.

Furthermore, contrary to the assertions that Charles was handling all of his affairs on his own, that was not the case with the registration of the domestic partnership. The facts show that Ms. Heberlein was writing checks for Charles and asking other persons to process paperwork for Charles. Ms. Heberlein had every opportunity to influence the terms of the Will.

Moreover, while Ms. Heberlein asserts that there is no evidence she influence the terms of the Will, the facts show otherwise. If the "lengthy"

relationship between Charles and Ms. Heberlein was so important that she chose to assert it was a CIR then why did not any of this estate planning take place at an earlier date during the relationship? If Martin was the terrible person that Ms. Heberlein makes him out to be then why didn't Charles change his estate plan long ago? Because these reasons that are proffered by Ms. Heberlein are incorrect. This case involves the typical patter – exclude the already named beneficiary and then obtain new estate planning documents from a different attorney for the benefit of the person involved in the confidential relationship. That is the main reason the law allows the presumption of undue influence to apply in situations like these.

D. Martin produced evidence supporting his claim for fraud in the inducement and summary judgment was improperly granted.

Ms. Heberlein suggests that a presumption of fraud in the inducement does not exist under Washington law. *Br. of Resp't* at 29-34. However, in his opening brief, Martin described for the Court how the presumption of fraud in the inducement exists and in particular how the State Supreme Court in *Estate of Lint* analogized undue influence and fraud in the inducement. "As is the case with undue influence, fraud may be presumed in equity where the donor and donee share a confidential relationship. "[W]here the court was faced with a highly suspect transaction between persons sharing a confidential relationship . . . we view the presumption of fraud as appropriate." *Pederson v. Bibioff*, 64 Wn. App. 710, 828 P.2d 1113 (1992). Of course the critical factor in the analysis

of *Estate of Lint*, was that the party benefitting from the will change had isolated the decedent from her family, just as Ms. Heberlein isolated Martin and his family from Charles.

Recall that the alleged main reasons for the Will change were that Charles supposedly felt that he had "given enough" to Martin over his lifetime due to the gift of a home and Martin's "criminal background" made him undeserving of an inheritance, yet there was no evidence of any such gifts and the only "evidence" of a criminal background was an allegation of criminal activity when Martin was a minor; before the 1988 Will was signed.

E. The trial court erred when it granted summary judgment to Mrs. Heberlein dismissing Martin's constructive trust claim pursuant to the wrong statute of limitations.

1. Martin's arguments regarding the Personal Representative's filing of a misleading inventory have absolute bearing on the application of the Statute of Limitations

As the Court is aware, first and foremost, Martin asserts that the trial court applied the incorrect statute of limitations to Martin's constructive trust claim. However, under any statute of limitations, Ms. Heberlein's false and misleading inventory that was filed cannot be ignored. Ms. Heberlein asserts that the inventory was properly filed pursuant to her obligations as the personal representative under the 2010 will and pursuant to RCW 11.44.015. *Br. of Resp't* at 37.

Ms. Heberlein's argument that RCW 11.44.015 does not require her to provide an inventory of non-probate assets does not excuse the obligation she undertook, as Personal Representative, when she specifically misrepresented to the Court and to Martin that there were no non-probate assets. There is a significant difference.

Ms. Heberlein's willful refusal to comply with statutes began long before she filed the false and misleading inventory. Charles passed away on December 5, 2010. Ms. Heberlein was clearly in possession of or otherwise in control of the Will that Charles apparently signed shortly before his death. Ms. Heberlein did not file Charles's 2010 Will with the Court until September 13, 2011; well over 10 months since Charles's death.

Ms. Heberlein violated RCW 11.20.010 which specifically provides that any person having custody or control of any will, "shall, within thirty days after he or she shall have received knowledge of the death of the testator, deliver said will to the court having jurisdiction[.]" (Emphasis added). She could arguably claim an additional forty days as the statute continues that "any executor having in his or her custody or control any will shall within forty days after he or she received knowledge of the death of the testator deliver the same to the court having jurisdiction." (Emphasis added). Finally, RCW 11.20.010 provides that any person, "who shall willfully violate any of the provisions of this section shall be liable to any party aggrieved for the damages which may be sustained by such violation." Ms. Heberlein only filed the 2010 Will with the Court when Martin sought to admit the earlier dated Will because he assumed Ms. Heberlein agreed

that the 2010 Will was invalid because she was not taking any action to begin a probate of Charles's Estate.

Ms. Heberlein complains that Martin's first Petition "was filed on July 27, 2011" and that "without citation to the record or support, Martin claims to have made every effort to determine what was happening with the probate of [Charles's] estate." *Br. of Resp't* at 38. Notably, Ms. Heberlein does not cite to the record for her position that Martin's first Petition was filed on July 27, 2011. Id. Ms. Heberlein is correct when she states that Martin's first Petition was filed on July 27, 2011. However, her failure to detail what that Petition was about shows the lengths that she will go to in order to convince the Court that Martin could have found out information about the non-probate assets.

The Petition that Martin filed on July 27, 2011 was his verified Petition to admit Charles's March 11, 1988 Will to probate. However, Ms. Heberlein's misleading argument in this regard is demonstrated by the additional information Martin put in his Petition:

> Petitioner [Martin] had been made aware that the Decedent may have executed a Last Will and Testament subsequent to the March 11, 1988 Will through The Hossanah Law Group, PLLC. Petitioner has received a copy of said Will which is dated October 18, 2010, approximately six weeks before the Decedent passed away. A copy of the alleged October 18, 2010 Will is attached hereto as **Exhibit B** and incorporated by reference throughout.
>
> On or about April 5, 2011, counsel for the Petitioner wrote to Ms. Hossanah and asked, in part, that notice be provided to counsel for the Petitioner if a probate of the

> alleged October 18, 2010 Will was initiated. A true and correct copy of the April 5, 2011 letter is attached hereto as **Exhibit C** and incorporated by reference throughout. To date, it does not appear that the alleged October 18, 2010 Will has been filed with the Court or that a probate has been initiated of the Decedent's estate.

Appellant's Designation of Supplemental Clerk's Papers

To state that there is "no evidence" that Martin undertook to discover the existence of the non-probate assets is misleading, particularly when Ms. Heberlein cites in her *Respondent's Brief* to the very evidence that demonstrates otherwise – Martin's July 27, 2011 Petition. Martin had no ability to obtain any information about Charles's non-probate assets unless the trial court would have granted Martin's July 27, 2011 Petition, admitted the March 1988 Will to probate and appointed Martin as Personal Representative. Then he would have had Letters Testamentary to find out the information and even then it is speculative that any financial institution would have provided him with such information. As this Court is aware, Martin's Petition was not granted because in August 2011 Ms. Heberlein appeared and opposed Martin's July 27, 2011 Petition.

As the Court is further aware on August 16, 2011, the trial court continued the matter to September 13, 2011, and ordered Ms. Heberlein to file an inventory so to say that Ms. Heberlein filed the inventory pursuant to her obligations as personal representative and pursuant to RCW 11.44.015, Br. of Resp't at 37, is wholly Ms. Leading. Ms. Heberlein filed an inventory because the trial court ordered her to do so. As this Court further knows, the inventory was filed on September 6, 2011, well after six

months of the date of Charles's death and shortly before the one year anniversary of Charles's death and in that inventory she stated there were no bank accounts nor was there any money. Given Ms. Heberelein's actions in delaying the probate of Charles's Estate and then misrepresenting the existence of bank accounts, there was no way for Martin to discover the existence of said accounts. Regardless, Martin did not make a claim under Chapter 11.11. RCW. His claim was that the Court impose a constructive trust over any such assets if it is determined that the 2010 Will is invalid. As this Court is aware, Ms. Heberlein testified in her deposition that Charles had separate accounts with Bank of America and Columbia Bank. CP 133-153. There is no other diligence Martin could have exercised to find out about the existence of the subject accounts. Contrary to Ms. Heberlein's assertions, the record clearly shows that Marty made every effort to determine what was happening with his father's assets. Intentionally delaying and then providing misleading information cannot be used as a sword to assert that the misled party did not act with diligence.

2. Martin's interpretation of the applicability and timing of the Chapter 11.11. RCW statute of limitations is correct.

Ms. Heberlein next asserts that Martin incorrectly argues that RCW 11.11.070 could not have applied to him because he was not a testamentary beneficiary until the 2010 Will was invalidated. *Br. of Resp't* at 39. Ms. Heberlein, in fact, argues that Martin was never nor would he ever be a testamentary beneficiary because the 1998 Will was not a

"superwill" under the criteria of RCW 11.11.020. Id. Ms. Heberlein's own analysis supports the conclusion that the trial court never should have applied the statute of limitations in RCW 11.11.070. If Chapter 11.11 RCW does not apply, as Ms. Heberlein seems to suggest then the statute of limitations in RCW 11.11.020 cannot apply. There can be no dispute that Chapter 11.11 RCW is the "superwill" statute. That particular statutory scheme is designed to address the situation where there is a conflict between and the terms of a will and a pay-on-death or joint tenancy designation of a bank account.

RCW 11.11.020(2) allows only two persons to petition, "the superior court having jurisdiction over the owner's estate[.]" Those two people are either the "testamentary beneficiary" who claims ownership of the non-probate asset "otherwise transferred to beneficiary not so entitled" or the personal representative of the estate. Id. Martin was neither and the issue about whether the 1988 Will constitutes a "super will" is not for adjudication with this Court or the trial court at this point. The salient point is that the trial court applied the statute of limitations found in RCW 11.11.070 to Martin's claim of constructive trust. That statute of limitation only applies to testamentary beneficiaries or personal representatives and Martin was neither. It is manifestly unfair for Ms. Heberlein to now try to litigate the issue of whether the 1988 Will is a "super will" without citation to any authority for such a proposition. This Court is not a fact finding court.

3. The statute of limitations defense was waived

In his *Appellant's Brief*, Martin cited to CP 8-12 and argued that the Answer failed to plead the statute of limitations as an affirmative defense. Ms. Heberlein now states that she "preserved this defense when she plead it in her Answer." *Br. of Resp't* at 42. A thorough review of CP 8-12 shows that no affirmative defense of statute of limitations was pled, let alone any citation to RCW 11.11.020 or even Chapter 11.11 RCW. The defense, even if applicable is waived as a result of her failure to plead it. *In re Estate of Palmer*, 145 Wn. App. 249, 187 P.3d 758 (2008), making summary judgment the trial court granted in error and Ms. Heberlein conducts no analysis of *Estate of Palmer* stating only that the critical difference is that Ms. Heberlein pled the defense in her answer. CP 8-12 is the only Answer of which Martin is aware and there is no affirmative defense of statute of limitations in that document.

Notably, *Estate of Palmer* addressed the statute of limitations set forth in RCW 11.11.070(3). *Id.* In fact, the trial court in *Estate of Palmer* specifically found that the RCW 11.11.070 statute of limitations did not apply "because Palmer was not a 'testamentary beneficiary' as defined in RCW 11.11.010(10)." *Id.* at 257.

This Division of the Court of Appeals further held that under CR 8(c) affirmative defenses are waived unless they are: "(1) affirmatively pleaded; (2) asserted in a motion under CR 12(b); (3) tried by the parties express or implied consent." *Id.* (citing *Harting v. Barton*, 101 Wn. App.

954, 962, 6 P.3d 91 (2000)). "None of these conditions apply to Golden's RCW 11.11.070(3) defense." *Id.* at 257. "We hold that Golden waived the time bar defense of RCW 11.11.070(3) by failing to plead it in her answer or in a CR 12 motion." *Id.* at 258. Ms. Heberlein attempts to escape this ruling by asserting that because she moved for summary judgment to dismiss Martin's claims before the issuance of a schedule, there was no waiver of the defense. *Br. of Resp't* at 43. There is no citation to authority for this proposition. The RCW 11.11.070(3) defense was never plead as an affirmative defense. It was not brought in a 12(b) motion and it was not tried through the consent of the parties. The defense was waived and Martin requests that this Court reverse the trial court's decision on summary judgment and hold that Martin is entitled to recoup his attorney's fees and costs related to this issue.

4. The argument that the statute of limitations for a constructive trust does not apply to a claim for constructive trust is facially invalid.

Ms. Heberlein next asserts that Martin "argues for the first time on appeal that the trial court should have applied a three-year statute of limitations based on a theory of constructive trust." *Br. of Resp't* at 43. First and foremost, Ms. Heberlein is simply incorrect when she asserts that Martin argues for the first time on appeal that the trial court applied the incorrect statute of limitations. In *Martin Thornton's Opposition to the Personal Representative's Motion for Summary Judgment Regarding*

Non-Probate Assets filed with the trial court on June 8, 2012. Martin specifically argued as follows:

> The Personal Representative has mistakenly applied the wrong statute of limitations to the claim now attacked by the Personal Representative (RCW 11.11.070). Mr. Thornton is not a testamentary beneficiary" as that term is used in the statue because his will contest of the October 2010 Will has not yet been successful.

CP 124-127.

Additionally, it was not and truly is not Martin Thornton's job to educate Ms. Heberlein as to the appropriate statute of limitations that may apply and Ms. Heberlein cannot cite to any authority for that proposition. This is particularly true in light of the fact that Ms. Heberlein never met the requirements of CR 8(c) and *Estate of Palmer* with respect to *any* statute of limitations defense.

Notably, the Petitioner in *Estate of Palmer* asserted a claim of constructive trust on behalf of the Estate of her parents regarding non-probate assets. "The court also imposed a constructive trust on the funds in Golden's personal account at Edward Jones to pay the $597,650.42 judgment on the claim." *Estate of Palmer*, at 257-258. The Respondent attempted to defeat the claim by arguing application of RCW 11.11.070(3). That attempt was rightfully denied by the trial court and affirmed by this Division of the Court of Appeals.

Ms. Heberlein attempts to avoid the whole argument by asserting that because Martin did not assert that the correct statute of limitations for a constructive trust claim is a three year statute of limitations discovery rule, Martin cannot assert that argument on appeal. Ms. Heberlein cites to *Western Wash. Cement Masons Health & Sec. Trust Funds v. Hillis Homes, Inc.*, 26 Wn. App. 224, 612 P.2d 436 (1980), as support for her proposition.

Hillis Homes, however, is inapplicable to this case and Ms. Heberlein misapprehends the nature of the rule set forth in *Hillis Homes*. The entirety of the Court's holding on this issue in *Hillis Homes* is set forth below:

> Hillis Homes suggests that because its observance as well as the union's enforcement of the contract was piecemeal, the union should be deemed to have abandoned the contract. *Monroe v. Fetzer*, 56 Wn.2d 39, 350 P.2d 1012 (1960). The record corroborates the trusts' position that this issue was never raised at trial. An issue raised for the first time on appeal will not be addressed. *Pearce v. G.R. Kirk Co.*, 92 Wn.2d 869, 602 P.2d 357 (1979). We, therefore, do not reach this issue.

Id. at 234.

Martin has always asserted that the application of RCW 11.11.070 to a constructive trust claim is improper. However, there is no authority for the proposition that in opposing a motion for summary judgment on a statute of limitations claim, the Petitioner or Plaintiff must set forth what it believes the applicable statute of limitations to be. That would be overburdensome on Plaintiffs or Petitioners and would essentially force them to do the work

of the Respondent. Martin only points out that the three-year discovery rule set forth in RCW 4.16.080 and *Viewcrest Coop. Ass'n v. Deer*, 70 Wn.2d 290, 294-95, 422 P.2d 832 (1967), is the correct statute of limitations to illustrate the error of Ms. Heberlein's analysis. The Court applied the wrong statute of limitations and the order granting summary judgment to Ms. Heberlein on that issue should be reversed.

It is actually Ms. Heberlein, "for the first time on appeal" who asserts now that the even if the trial court erred in applying the wrong statute of limitations, the trial court was well within its authority to dismiss the constructive trust claim pursuant to RCW 11.96A. Br. of Resp't at 44. There is no citation to any authority or specific statute in Chapter 11.96A upon which Ms. Heberlein basis such an argument.

F. The Court should reverse the orders of attorney's fees granted against Marty

Ms. Heberlein provides no analysis to her argument that the trial court properly awarded attorney's fees in this matter. She simply asserts that because the trial court's underlying orders regarding the dismissal of claims was proper, so was the award of attorney's fees. Without any analysis of Ms. Heberlein on this issue, there is nothing for Martin to "reply" to. Both parties request an award of attorney's fees and costs pursuant to RAP 18.1 and RCW 11.96A.150 related to this appeal.

V. CONCLUSION

For the reasons stated above, Marty respectfully requests that the Court reverse the trial court's entry of summary judgment orders, dismissing Marty's TEDRA Petition for a Will contest and his claim of constructive trust. The trial court should have imposed the presumption of undue influence and presumption of fraud in the inducement given the facts. That presumption and the facts provided establish that the Personal Representative was not entitled to judgment as a matter of law and that genuine issues of material fact exist; particularly when the facts are viewed in a light most favorable to Marty as they are required to be.

Moreover, this Court should reverse the trial court's grant of summary judgment dismissal of Marty's constructive trust claim pursuant to a Chapter 11.11 RCW analysis. First and foremost, the answer to Marty's TEDRA Petition never pled statute of limitations as an affirmative defense. Second, the trial court applied the wrong statute of limitations as claims for constructive trust are subject to the three-year, discovery-related statute of limitations. Third, Marty would not become a "testamentary beneficiary" until the October, 2010 Will was revoked and then and only then, a Chapter 11.11 RCW statute of limitations may begin to run.

RESPECTFULLY SUBMITTED this 4th day of February, 2015.

LEDGER SQUARE LAW, P.S.

By: _____
Stuart C. Morgan, WSBA # 26368
Attorneys for Marty Thornton

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

Mr. C. Tyler Shillito Smith Alling, P.S. 1515 Dock St., Suite 3 Tacoma, WA 98402	☑ U.S. First Class Mail, postage prepaid ☐ Via Legal Messenger ☐ Overnight Courier ☑ Electronically via email ☐ Facsimile

DATED this 4th day of February 2015 at Tacoma, Washington.

Amy Jean Shackelford

Amy Jean Shackelford, PLS
Legal Assistant to Stuart C. Morgan