NO. 45250-2-II

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION TWO

THE EVELYN PLANT TESTAMENTARY TRUST, and the FRANKLYN & EVELYN PLANT GREEN POINT FOUNDATION,
Appellants,

v.

CARL GAY,
Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR CLALLAM COUNTY

The Honorable Keith Harper, Judge

AMENDED OPENING BRIEF OF APPELLANTS THE EVELYN PLANT TESTATMENTARY TRUST AND THE FRANKLIN AND EVELYN PLANT GREEN POINT FOUNDATION

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I. INTRODUCTION

Because the trial court errantly ruled that the pertinent and respective statute of limitations [1] had expired for the Evelyn Plant Testamentary Trust (the Trust) and the Franklyn ad Evelyn Plant Green Point Foundation (the Foundation), they were precluded from participating in malpractice litigation against Carl Gay, the Respondent here. Mr. Gay was the attorney who errantly drafted, by his own definition and admission, the operative documents, and the attorney who orchestrated a TEDRA settlement which wholly prevented any participation by the Foundation. Moreover, Mr. Gay billed the trust for this favor. Because the trial court errantly ruled on the SOL issue as to both parties, its summary judgment of dismissal must be reversed.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in granting summary judgment dismissal of the malpractice claim brought by the Trust against attorney Carl Gay based on his conclusion that the SOL had expired for the Trust.
2. The trial court erred in granting summary judgment dismissal of the malpractice claim brought by the Foundation against attorney Carl

[1] Hereafter, generally, "SOL" will be used to substitute for "statute of limitations" or derivations of that phrase.

Gay based on his conclusion that the Foundation could have been formed anytime by anyone.

3. The trial court erred in allowing and considering inadmissible evidence in the summary judgment proceedings, namely, the second declaration of Carl Gay.
4. The trial court erred in applying the summary judgment standard in adopting the second declaration of Carl Gay, on the issue of when his representation of the trust ended, to calculate the date when the SOL for the Trust would begin to run.
5. The trial court erred in ruling that the intervention ruling and the principles of Columbia Gorge had no application to the claim of the Trust or the Foundation in evaluating the application of the SOL to the case.
6. The trial court erred in failing to rule that the SOL was tolled with respect to the Foundation because of the decision of Carl Gay to abort the Foundation formation process because of his disagreement with the Linths.

Issues Pertaining to Assignments of Error

1. Whether a CR 56 reply declaration containing blatant legal argument, hearsay, and new factual assertions should be stricken, in whole or in part for failing to be in conformance with the personal knowledge requirements of CR 56 and for adding new facts to the record without the opportunity for the nonmoving party to respond?
2. Whether the court's allowance of the injection of new facts into a CR 56 proceeding by way of Gay's reply declaration should mandate that a trial court either grant a continuance for a specific reply declaration or mandate that the CR 56 motion be denied because of obvious dispute about material facts?
3. Whether the trial court improperly adopted the factual statement of Carl Gay in his CR 56 reply declaration as to the cessation of his representation of the trust in 2004 in ruling that the SOL had expired?
4. Whether the order allowing the intervention of the Trust and Foundation effectively addressed the SOL argument under the authority and rubric of Columbia Gorge?
5. Whether the trial court erred in ruling that Carl Gay was no longer representing the trust after 2004 when there was no objective

evidence of a withdrawal presented to the trial court or other notice to the trust or its beneficiaries?

6. Whether the trial court erred in concluding there was no issue of material fact as to whether the SOL had run as to the Trust and the Foundation?

7. Whether the trial court erred in failing to rule that the SOL for the Foundation was tolled until 2011, when the Foundation was later formed, when Carl Gay elected to treat the First Amendment as invalid after reaching an impasse with the Linths as to the structure of the Foundation, and thereafter terminating the Foundation formation process?

III. STATEMENT OF THE CASE

Statement of Facts

The following were represented as uncontested facts at the summary judgment proceeding before Judge Harper:

1. Mrs. Evelyn Plant was competent to sign her trust and estate planning documents on July 22, 2000 and August 22, 2000, and until shortly before her death. CP: 19, 461, 475.

2. Mrs. Evelyn Plant passed away on January 1, 2001. Her estate value was approximately $3 million. CP: 374, 461.

3. Mrs. Plant owned and lived on a remarkable piece of property commonly referenced as Green Point. CP: 391..

4. Mrs. Plant was a widow since 1981. CP: 359.

5. Mrs. Plant engaged Mr. Gay, an attorney at law specializing in estate planning, to assist her in estate planning in somewhere around 1995. CP: 433, 461, 469-470.

6. Mr. Gay *always* knew that Mrs. Plant wanted to provide for Jenny Linth and that from early on she wanted Jenny to have some form of a life estate in Green Point; he repeatedly acknowledged his knowledge and belief in such fact and his full awareness of it in multiple documents both before and after the death of Mrs. Plant. CP: 391, 410, 470.

7. Mr. Gay, acting as attorney at law for Mrs. Plant, prepared a set of estate planning documents for Ms. Plant in the fall of 2000 which included a trust with testamentary provisions. No other attorney participated in the drafting of these documents. CP: 469-470.

8. The testamentary provisions of the July 22, 2000 trust provided Jenny Linth with the opportunity to live at the main residence at Green Point for a limited number of years at no cost, except to participate in the maintenance of the property, and then a life estate on a to be determined "carve out" parcel on/from Green Point. She was also specifically

provided the right to collect rents from the guest house on the property. CP: 361, 374, 470.

9. The July 22, 2000 version of the trust, in its original form, had no reference to any foundation, foundation plan or exhibit to be attached somehow to the trust. The trust originally provided for a residuary gift of the Green Point property to Crista Ministries. Ms. Plant was designated as the trustee. CP: 374, 399-403.

10. Mrs. Plant signed the trust document on July 22, 2000 with Mr. Gay notarizing her signature. The signing occurred at Green Point. CP: 361-363.

11. Mrs. Plant never revoked the July 22, 2000 trust. CP: *Id.*

12. On August 15, 2000 Mrs. Plant met with Claudia Smith, Louis Torres, Jenny Linth, Holly Johnson and John Linth to learn about a plan for a proposed nonprofit foundation for Green Point. On that day, after getting the information she felt she needed, she said "Let's do it". CP: 399-403.

13. On August 16, 2000 Mrs. Plant resigned as trustee of her trust and allowed Mr. Doran to succeed her. She also allowed him to act as her attorney-in-fact. She wanted Doran to "carry out the details of the project". *Id.*

14. By August 17, 2000 Mr. Gay had conversations with Mrs. Plant and Mr. Doran, her banker, about these changes to her estate plan. The foundation would supplant and replace the then currently named Green Point beneficiary, Crista Ministries; additionally, Mrs. Plant then wanted a broader life estate gift to be written in for Jennifer Linth. She was to be able to live on the property, for life, at no cost to Ms. Linth. A letter that Mr. Gay sent to Mrs. Plant anticipated an appointment at his office the next day, August 18, 2000 at 4 pm. The letter included a copy of the then proposed first amendment to the trust. CP: 469-472.

15. Mr. Gay, acting as attorney at law for Mrs. Plant, is the only attorney who drafted the proposed amendment. CP: 361-363.

16. The scheduled office meeting on August 18, 2000 is not reflected in the time records of Mr. Gay, which were extensive. Further the Gay time records contain no other entries, *ever*, of any further communications with Mrs. Plant up to the date of her death on January 1, 2001. CP: 469-472. On August 21, 2000 Mr. Gay conducted an office meeting with Dan Doran and Claudia Smith. During the meeting Mr. Gay was informed of a need to make revisions to the proposed first trust amendment that he had drafted on or before August 17, 2000. CP: 401.

17. By August 22, 2000 Mr. Gay had prepared another draft of the first amendment which contained an error, namely, the wrong middle

initial for Mr. Doran. The draft also contained an underscored blank for the dating of the document: "this ____ day of August, 2000". CP: 358-369.

18. Mr. Gay, in drafting (or redrafting) the proposed first amendment included the following language about the establishment of a nonprofit foundation which would eventually receive Green Point (CP: 361-362):

> trustee shall convey the Green Point residence, together with the sum of Fifty Thousand Dollars ($50,000.00), to a nonprofit corporation and tax-exempt private foundation to be created by trustee in accordance with the terms set forth on the document entitled "THE FRANKLIN AND EVELYN PLANT GREEN POINT FOUNDATION PLAN" (hereinafter "the Foundation plan"), a copy of which is attached
>
> hereto marked Exhibit 1 and by this reference incorporated herein as though set forth in full. The gift of cash and the Green Point residence to the Foundation shall be subject to the following conditions, restrictions, and covenants to be contained in the trustee's deed to the Foundation:
>
> (a) For a period of time measured by the

19. On August 22, 2000 Mr. Doran came to Mr. Gay's office, got the current draft of the amendment and brought it to Mrs. Plant, who signed it. Mr. Doran corrected the errors with his middle initials on pages one and three of the document with interlineations. Neither Mr. Doran nor Mrs. Plant inserted a date on the blank line for the date on page 1 of the document. Mr. Doran later that day returned the document to Mr. Gay, signed by Mr. Doran and Mrs. Plant. CP: 358-369, 399-404.

20. The signed amendment provided for a life estate for Jennifer Linth in Green Point. CP: 362.

21. Ms. Smith immediately began working on the foundation. By August 30 she had presented a draft plan by email to Mr. Doran, which included a list of directors which included several members of the Linth family, to which Mr. Gay eventually claimed to be inconsistent with the intentions of Ms. Plant. Mr. Doran immediately sent an email to Ms. Smith that indicated that the plan looked acceptable and that it reflected a lot of work she had done. He voiced no objection to the composition of the board which included Doran and Gay. Jennifer Linth was to be the lead person for the foundation, although there was some debate about how extensive her role was to be. CP: 399-404.

22. There was a meeting held at Green Point on September 28, 2000, with Mrs. Plant present and participating, during which that plan was discussed. Mrs. Plant had no objections to the proposed membership of the foundation board. *Id.*

23. On November 28, 2000 Ms. Smith sent Doran an email containing a list of the foundation expenses to date, along with a budget and spreadsheets which included a list of directors which included the Linths. Mr. Doran did not object. *Id.*

24. As indicated above, Mrs. Plant passed away on January 1, 2001. CP: 470.

25. On February 21, 2001, Ms. Smith again contacted Mr. Doran and again provided him the same foundation plan again, to which there was no objection. CP: 399- 404.

26. Mr. Gay and Doran were in the process of forming the foundation in March of 2001, and Mr. Gay was then telling outside parties that Ms. Linth had a life estate in Green Point. CP: 391, 399-404.

27. With the oversight of Gay providing legal counsel to the estate and trust, the trustee made a series of large distributions to various beneficiaries, including Jennifer Linth, *before the estate tax issue was settled and paid.* These distributions were dubious as they threatened the ability of the trust to dispose of Green Point according to the wishes of Mrs. Plant. CP: 399-404.

28. By July 2001 Mr. Gay was learning in no uncertain terms that the trust documents he had drafted were defective and that various parties were taking competing positions on their validity, including Crista Ministries who, by all accounts (including their own) had been effectively disinherited. Crista had been unaware of the apparent drafting issue until Mr. Gay disclosed it to them, apparently under the auspices that he had a duty to do so. CP: 374-375.

29. On or about July 11 and 13, 2001, Mr. Gay received correspondence from an estate planning attorney who Mr. Gay had researched and determined to be an expert in estate planning matters, Dean Butler, from the Seattle law firm Stokes, Lawrence P.S.. Mr. Gay had previously arranged for Mr. Butler to be hired by the trust to review the validity of the first amendment that Mr. Gay had drafted. Mr. Butler's correspondence plainly stated and opined, in various places, that Mr. Gay likely had a conflict of interest in continuing to represent the trust in this matter because he had drafted the underlying documents – the July 22, 2000 trust and the August 22, 2000 First Amendment. CP: 392-395, 405-406; 335-344(on reconsideration)..

30. Mr. Gay disregarded the conflict warnings in the Butler documents and continued to represent the trust. He never disclosed the Butler correspondence to Jennifer Linth. The bill for the Butler law firm was paid out of the trust. Mr. Gay never formally withdrew from representing the trust. CP: 351, 397, 431.

31. By roughly October of 2001, Mr. Gay had decided that the document that he himself had drafted, namely the First Amendment, which granted a life estate to Ms. Linth, was defective and "failed" because the "Exhibit 1 to be attached" – a clause he himself drafted – did not occur before the death of Mrs. Plant. This was inconsistent with the

position originally taken by Gay following the death of Mrs. Plant, by the attorneys for Ms. Linth, and by the opinion and report of Mr. Butler, who Mr. Gay had hired as an expert on that precise issue; Mr. Butler's bill was paid by the trust, and not by Mr. Gay. See, CP: 392-395, 405-406; 410, 335-344(on reconsideration).

32. Ms. Linth's attorneys petitioned the court for some interpretation of the Gay documents. In response Gay, acting on behalf of unrepresented beneficiaries, insisted that they be notified of the action. CP: 374-375.

33. Ms. Linth has never received a life estate in Green Point in any form to this date.

34. Ms. Linth has incurred extraordinary attorney fees in litigating this matter against the trustee and his attorney Carl Gay. She was forced to spend her own money on attorney fees prior to June of 2001; virtually all of the $100,000 gift she received from Mrs. Plant in June of 2001 was necessarily spent on attorney fees to address the defective draftsmanship of the first amendment, and the fallout therefrom. CP: 374-375.

35. Ms. Linth remains indebted to various attorneys for the legal fees she incurred in the estate litigation following the exhaustion of the $100,000 gift from Mrs. Plant. *Id.*.

36. The culmination of the Linth petition was a "global" settlement agreement, called the NJDRA (Non-judicial Dispute Resolution Agreement) which required Linth to abandon her life estate claim to Green Point. In lieu of it the property would be sold and some cash settlement made with Ms. Linth and the other estate claimants, including the generally acknowledged disinherited Crista Ministries. The presupposition of the NJDRA was that the drafting of the estate plan was defective. CP: 474-502

37. A later settlement of the estate litigation specifically excluded this malpractice action against Mr. Gay by Ms. Linth. CP: 417-423

38. As of this date, Ms. Linth does not have a life estate in Green Point, notwithstanding the fact that she has lived there over the ensuing time and dutifully and faithfully maintained the property for the benefit of the trust with little or no compensation. CP: 374.

39. The Foundation was formed after the NJDRA was entered, as a nonprofit corporation. Since its formation it has asserted its own rights to receive the Green Point property from the trust, as contemplated by the First Amendment drafted by Mr. Gay. CP: 425-427.

40. Mr. Butler, the expert attorney hired by Mr. Gay to counsel him on his counsel to the trustee and what to do about the entire problem, repeatedly advised Mr. Gay that in any settlement activity there must be

some mechanism in place to protect the ostensible claim of the Foundation to the property. He told Gay that the Foundation must be formed to participate in the discussions. CP: 434-436, 335-344 (on reconsideration).

41. Carl Gay apparently rejected the counsel of Mr. Butler on that point, and never formed the Foundation. The Foundation was therefore excluded from any of the NJDRA settlement proceedings. CP: 474-502.

Procedural History

The Foundation was formed on August 19, 2011. CP: 426.

The Motion to Intervene by the Trust and Foundation

The Trust and the Foundation moved for permission to intervene in the Jennifer Linth malpractice case on October 7, 2011. CP: 888. The motion and supporting documents alleged Mr. Gay is liable to the Trust because, inter alia, he 1) defectively drafted the operative estate planning documents here, namely the trust and the first amendment, such that the trust was exposed to extraordinary costs of the ensuing litigation, and thereby severely depleted, 2) that Mr. Gay had failed to complete the filing of an estate tax return for the estate because of the defective drafting and administration following the death of Ms. Plant, and 3) Mr. Gay, in extracting fees from the trust for himself in the meantime, had inappropriately continued representing the trust notwithstanding his

obvious conflict of interest. CP: 505. The Foundation's malpractice allegations echoed those of the trust, except that ultimately, the Foundation was deprived of its claim to the Green Point property by 1) the defective draftsmanship and 2) the ensuing settlement agreement that wholly excluded it. Id.

The centerpiece of the defense to the Trust and Foundation intervention motion was that the SOL had run as to both. CP: 674. The Columbia River Gorge case, *infra,* for several propositions, but not for the holding that the SOL is largely inapplicable when intervention is allowed. Id. Similarly, the defense cited the Janicki Logging opinion, *infra,* not as to its central holding, relating to the "continuous representation" rule in attorney malpractice cases, but for its dicta that exceptions to the general SOL should be limited. Id.

Because of certain procedural issues[2] the matter was eventually heard in Kitsap County. A hearing was conducted on the motion and the intervention was allowed, by order of Judge Sally Olsen of the Kitsap County Superior Court, sitting for the Clallam County Court. Her decision was issued on February 2, 2012. CP: 520. She declined the errant defense invitation to deny the motion based upon the SOL issue:

[2] The case was assigned to a visiting judge from Jefferson County because of perceived or actual conflicts. That Judge eventually became ill and the hearing was moved to Kitsap County.

believe they were entitled to receive the Green Point Property from the deceased Evelyn Plant. Mr. Gay opposes intervention first on the grounds that these claims are barred by the statute of limitations. At this stage of the proceedings, however, the Court cannot determine that the statute of limitations has run. The proposed complaint is vague as to the precise date of Mr. Gay's alleged misfeasance, and the futility of the intervention motion cannot be demonstrated by contrary factual allegations – certainly not by unsworn factual allegations.[1]

The motion for summary judgment by Carl Gay

In March of 2013 the defense moved for summary judgment against the Trust and Foundation based, in part, on the same SOL argument. The motion was calendared for June 21, 2013. The motion was supported by a single declaration of Carl Gay which, ironically, argued[3] that "he never represented the trust", only the trustee, Dan Doran.

1. I have never represented the Evelyn Plant Trust or the Green Point Foundation.
2. I have only represented Evelyn Plant ("Evelyn") and Dan Doran ("Doran"), the Trustee of the Trust she created.

CP: 469. Similarly, the briefing of the motion focused primarily on the idea that Mr. Gay owed no duty to the Trust and the Foundation because they were not his clients. CP: 459. The Carl Gay declaration never mentioned or otherwise addressed or attempted to address when he had ended his representation of Mr. Doran. The declaration seemed to allude that Mr. Gay participated in the completion of the TEDRA process and

[3] The term "argued" is used purposefully here, as that was, from the Plaintiffs' perspective, an issue of fact.

representation of Mr. Doran at least until the time the court adopted the agreement in October of 2005. [4]

The motion also *largely* repeated the statute of limitation arguments raised in the intervention proceedings before Judge Olsen.[5] A specific exception to this repetition was that the defense omitted any reference to the Columbia Gorge opinion which it had cited during the intervention proceedings. The briefing did, however, cite the Janicki Logging opinion, except not for the "continuous representation" rule, but only for the limited amorphous proposition that a "any rule" that shields defendants from stale claims "is in conflict" with the general three year SOL. The briefing did not otherwise announce or disclose the central "continuous representation" principle of Janicki Logging. CP: 459.

In response to the motion, the Trust and Foundation presented argument, based upon the Janicki Logging "continuous representation" rule, that the motion should be denied because there was no affirmative indication in the record as to when Mr. Gay *had stopped* acting on behalf of the trust, and that there was likewise a conflict of interest that would

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[4] Doran, his client, signed the agreement in 2004; it was adopted by the court, in October 2005. At various points in these proceedings there has been representation that the agreement became effective in May 2005; it was approved by the court in October 2005.

[5] The motion also alleged that Mr. Gay owed no duty to the trust and the foundation. In what is perhaps dicta here, the trial court stated he believed there was an issue of fact with regard to the duty, and declined summary judgment on that basis. RP June 21, 2013, 36, ln. 15 et seq.

have required full disclosure of such fact not only to the trust but to the beneficiaries. To that point in the record there had been no affirmative evidence from Mr. Gay – a notice of withdrawal, a letter, etc. -- as to when he may have stopped his representation of the trust. CP: 432. Additionally, the Trust and Foundation argued that Mr. Gay had actively concealed or at least failed to disclose his conflicts of interest, that he had failed to seek waivers from all interested parties, including Mr. Doran, and further that in the underlying estate litigation, he had affirmatively invoked the attorney client privilege to prevent Ms. Linth from receiving discovery, all of which was contradictory to principles of fiduciary law. Id. Additionally, as to the notice arguments raised, there was evidence adduced that Mr. Gay, and not Mr. Doran or the other fiduciaries, had possessed and controlled most if not all of the salient documents pertaining to malpractice claims of especially the trust. Id.; June 21, 2013 RP 33. Under such circumstances, there was at least an issue of fact as to a potential tolling as to the Trust and the Foundation under principles of fraudulent concealment.

As to the Foundation and the SOL, the Foundation argued that it could not possibly be bound by the statute as its very existence was foreclosed by the deliberate decision by Mr. Gay to disregard the affirmative wishes of Mrs. Plant to form it, as well as the instructions from

Mr. Butler to do the same. Id. Mr. Gay's motive in making such decision, by his own admission, was to prevent a contingent of Linths from populating the board for the foundation, and then perverting the wishes of Mrs. Plant. CP: 469-472. He apparently believed the scheme to be some sort of land grab to which only he understood and appreciated because of his own decaying relationship with the Linth family. Id. This was despite the fact that Mr. Gay had ostensibly acknowledged that arrangement both before and after the death of Mrs. Plant, but before the full ramifications of the estate planning problems of his own making had come into his focus, as detailed above.

The response to the summary judgment motion was filed and served on June 5, 2013.

On June 17, 2013 (three days before the hearing) the defense filed a response to the briefing of the Trust and Foundation which included briefing and a new declaration from Mr. Gay. CP 348-380. The declaration brashly announced that it was being introduced "to address briefly certain arguments advanced by intervenor plaintiffs (the Trust and the Foundation) in opposition to our pending motion for Summary Judgment". CP: 350. Mr. Gay went on to assert a series of legal arguments to contradict the briefing of the Trust and the Foundation. Id.

To respond to the continuous representation rule, and the related argument that Mr. Gay never removed himself from representation of the trust, Mr. Gay averred that he had "no involvement" with the trust after, apparently, "early" 2004[6]. In so stating, he implicitly agreed that there was otherwise no evidence as to when Mr. Gay stopped representing the trust, and no evidence of a formal withdrawal from representation[7]. CP: 350; June 21, 2013 RP 37.

> In that respect, it is important to note that I was replaced by S. Brooke Taylor, Esq. as attorney for the trust and for Dan Doran, the trustee, by the time of the mediation in early 2004. After that time, I had no further involvement as representative of the trustee or in any other matters related to the estate of Evelyn Plant, the decedent.

As to the argument about the SOL, Mr. Gay declared that "he engaged in an attempt to resolve the dispute regarding the original trust and the First Amendment, specifically alerting Mr. Doran to the *possibility* of a malpractice claim *by the trust* against me." Id. (italics in

[6] As can be seen from the declaration excerpt, there was no date provided in 2004.

[7] Plaintiffs' counsel told the court that despite a search before the hearing, there was no record of any formal withdrawal from Mr. Gay. In fact, Appellants continue to believe that further documents are available and were requested through discovery, that were denied, further illustrating the interplay between Mr. Gay and Mr. Taylor. Mr. Gay denied a prior request for them based upon attorney client privilege, notwithstanding the fiduciary setting. Additionally, it should be noted here that Mr. Gay has arguably waived the attorney client privilege by disclosing certain conversations with Mr. Doran about the fact that he and Mr. Doran discussed the foundation plan and both agreed that it was inconsistent with Mrs. Plant's estate objectives. Also, at other points in time he readily offered that he considered himself a "fact witness, as otherwise discussed herein, and disclosed communications between himself and Mr. Doran. CP: 410. The trial court ruling of course deprived the Plaintiffs' of the ability to compel production of those documents for the record here. In any case, presumably, if Mr. Gay had submitted a notice of withdrawal, or if he had secured any

original, underlining added). According to the reply briefing, based upon that undetermined date, the SOL *must have* run.

In response to the argument that Mr. Gay was representing the trust (and not just the trustee), and contradicting his earlier declaration, he averred that whether he was representing one or the other was a "distinction without a difference", and then announced his own perception of the operative legal rule.

> Plaintiff goes to great lengths to show that some of my work was in behalf of the Trust. I've represented the trustee and through that representation have performed tasks on behalf of the Trust. Whether I worked for the trustee or the Trust is a distinction without a difference: a beneficiary can't sue the attorney for the trustee or the trust, except in very limited circumstances, not applicable here.

Judge Keith Harper, sitting for the Clallam County Superior Court, heard argument on June 21, 2013. The Trust and Foundation verbally objected to much of the second Gay declaration as being argumentative and hearsay and argued that it raised new and specific factual issues for which CR 56 allowed no response absent permission from the court to supplement the record. Alternatively, in terms of the summary judgment motion, Plaintiffs argued this new factual representation was indicative of an issue of material fact as to when Gay's representation of Doran[8] ended.

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form of waiver from Mr. Doran, presumably he would have put those documents in the record here as the topic had been broached.

[8] As opposed to the trust, which he specifically claimed he did not represent, strangely, as noted above.

[9] June 21, 2013 RP 14-16. Plaintiffs sought leave to supplement the record. Id. Plaintiffs' counsel made specific reference to the continuous representation rule of Janicki Logging and a corresponding need to define when it was that Mr. Gay should be considered to have stopped representing the trust, as Mr. Gay's declaration was an obvious direct response to the potential application of that principle. Id. Additionally, the Trust and Foundation argued that the motion was not properly presented to the court, as there was no sworn testimony to support various summary judgment arguments, put forth by Mr. Gay, that the Trust and Foundation "knew", by some odd proxy, of the potential malpractice claims; for example, the trustee "knew" that there was a claim of malpractice because Mr. Butler's letter questioning whether Gay suffered from a conflict of interest was *mailed* to the then trustee, Mr. Doran, in 2001. Upon close examination, there was no indication that Mr. Gay himself had any forthright conversation with Mr. Doran about the conflict. And of course, there was no declaration from Mr. Doran[10].

Judge Harper granted the motion for summary judgment and dismissed all claims of the Trust and Foundation, based upon the SOL

[9] There is no specific provision in CR 56 allowing for additional filing of responsive declarations in this setting. The hearing was being conducted 3 days after service of this declaration.

argument. He adopted the arguments advanced by the defense, specifically stating that "I accept Gay's declaration that he no longer represented the trust after 2004." June 21, 2013 RP 37, line 17.

The Motion for Reconsideration

On July 1, 2013 the Plaintiffs timely filed a motion for reconsideration of the summary judgment order in which argument was presented to the court based upon the Columbia Gorge analysis. CP 307-344. The argument there presented was that the SOL argument was effectively addressed at the time the intervention was ordered. Id. On July 22, 2013, following further briefing by the parties on this issue, CP 292-306, Judge Harper denied the motion. CP: 290. His ruling stated that "Plaintiff is now trying to assert new legal theories after having lost the summary judgment motion", "[g]ranting a right to intervene is unrelated to whether a subsequent motion for summary judgment should be granted", and that "Columbia Gorge Audubon Society v. Klickitat County, 98 Wa App 618, 989 P2nd 1260 (1999) is not applicable to this case". CP: 290.

[10] Admittedly he is now deceased. Still that should have been treated as a conundrum for the moving party at this stage of the proceedings, under the rules of summary judgment.

IV. SUMMARY OF ARGUMENT

The trial court errantly allowed the second Gay declaration into the record, or certainly those parts that were hearsay, and were new factual assertions not addressed by the motion. Further, the trial court improperly adopted wholesale and as dispositive Mr. Gay's statements as to when his representation of the Trust ended. In either case the summary judgment motion should have been denied, as an issue of fact existed as to when the representation ended thereby tolling the SOL for the Trust. The trial court further erred it when it ruled that there was no application of Columbia Gorge principles here, as to the SOL. The claims of the Trust and Foundation were within the SOL under the rule of Columbia Gorge. Further, the claim of the Foundation should have been deemed tolled because of the application of principles of fraudulent concealment, as Carl Gay deliberately scuttled the plans to form the Foundation.

V. ARGUMENT

1. The summary judgment standard.

A motion for summary judgment should not be granted unless the pleadings, depositions, and affidavits on file show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Hontz v. State, 105 Wn.2d 302, 311, 714 P.2d 1176 (1986). The appellate court engages in the same inquiry as the trial court, and all

evidence and inferences are considered in the light most favorable to the nonmoving party. Id.

> In such cases facts and all reasonable inferences therefrom must be considered in the light most favorable to the nonmoving party, and summary judgment should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. The burden is on the moving party to demonstrate that there is no issue as to a material fact, and the moving party is held to a strict standard. Since the plaintiff's evidence raised genuine issues of material fact with regard to whether the defendants acted negligently and whether such negligence, if any, was a proximate cause of the injuries, these issues are not properly decided on summary judgment.

Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co., 115 Wash.2d 506, 516, 799 P.2d 250 (1990); Osborn v. Mason County, 157 Wash.2d 18, 22, 134 P.3d 197 (2006).; Folsom v. Burger King, 135 Wash.2d 658, 663, 958 P.2d 301 (1998). Wash. Fed'n of State Emps., Council 28 v. Office of Fin. Mgmt., 121 Wash.2d 152, 163, 849 P.2d 1201 (1993).

The non-moving party is entitled to all reasonable inferences from the evidence before the court at summary judgment. Scott v. P. W. Mountain Resort, 119 Wash.2d 484, 487, 834 P.2d 6 (1992). Compare Frisino v. Seattle School Dist. No. 1, 160 Wn. App. 765, 249 P.3d 1044 (Div. I 2011)(reversing summary judgment for dismissal of employment discrimination and retaliatory discharge claims for failure to properly evaluate reasonable inferences for non-moving party). Judgment as a matter

of law should "not be granted unless the court can say, as a matter of law, that there is neither evidence nor reasonable inference from the evidence sufficient to sustain the verdict."Pritchett v. City of Seattle, 53 Wash.2d 521, 522, 335 P.2d 31 (1959). Such a motion admits the truth of the opponent's evidence and all inferences that can be reasonably drawn therefrom, and requires the evidence be interpreted most strongly against the moving party and in the light most favorable to the opponent. ALCOA v. Aetna, 140 Wash.2d 517, 529, 998 P.2d 856 (2000); Goodman v. Goodman, 128 Wash.2d 366, 371, 907 P.2d 290 (1995). "The credibility of witnesses and the weight to be given to the evidence are matters which rest within the province of the jury; and, even if it were convinced that a wrong verdict had been rendered, this court would not substitute its judgment for that of the jury so long as there was evidence which, if believed, would support the verdict rendered." Burke v. Pepsi-Cola Bottling Co. of Yakima, 64 Wash.2d 244, 246, 391 P.2d 194 (1964). The judicial urge to take questions of fact from the jury must be resisted.

2. The trial court improperly allowed the second CR 56 declaration of Carl Gay.

The declaration was rife with legal argument. The defense submitted the second CR 56 Carl Gay declaration in response to the briefing and supporting papers filed by the Plaintiffs on the summary judgment motion.

The Plaintiffs in this case were the nonmoving party. The declaration was objectionable from several vantage points. First, of course, was that it was a thinly veiled legal brief, in which Mr. Gay fully and obviously sought to influence the trial court with his own personal beliefs about the application of the law to his case. It was briefing without citation to law, except from Mr. Gay himself. Those segments of the declaration were subject to being stricken because they were not factual.

The declaration introduced critical inadmissible hearsay evidence. In reply to the argument that the SOL was tolled because of the conflict of interest, and that there was no waiver of the conflict available, the defense wanted the court to believe that Mr. Doran, the original trustee, was fully aware of it and made some conscious decision to disregard it. Of course, the problem with this presentation was that Mr. Doran was deceased. In support of the argument that the trustee, Mr. Doran, had actual or constructive knowledge of the conflict.[11], Mr. Gay's second declaration states that Mr. Doran "received a letter dated July 11, 2001" from Mr. Butler raising the conflict. Nowhere does Mr. Gay identify how he has personal knowledge that such letter was received by Mr. Doran; similarly the briefing never identifies how such knowledge can be proved without some testimony from

[11] Apparently this was the only response possible on this point, as there was no written waiver submitted into the record, supporting the original argument presented by the Plaintiffs.

Mr. Doran. This is pure hearsay. For purposes of summary judgment, this cannot be overlooked. Still counsel for Mr. Gay in oral argument, clearly used it to assert there was actual notice to the trustee. June 21 RP 5. This hearsay needed to be stricken from the record but it was not. That this hearsay was prejudicial to the Plaintiffs in this setting cannot be denied. The judge specifically relied upon it in ruling against them on the motion:

> . . . even beyond that, the trust had notice in 2001 when Mr. Doran got the letter from Butler.

June 21, 2013 RP 38.

The declaration injected new assertions of fact. The Plaintiffs' specifically alleged that Mr. Gay's representation of the Trust never formally ended because he never formally withdrew. In response to this, Mr. Gay averred something new and specific, *that as far as he was concerned* his affiliation with the trust and trustee ended sometime in "early 2004". It was not that *he had* formally stopped representing the trust. This was and is a critical point, it turns out, with respect to appropriate application of the SOL, one not previously urged on the court nor disclosed to the court by Mr. Gay's counsel. Under the rule of Janicki Logging v. Schwabe, Williamson & Wyatt, 109 Wn. App. 655, 37 P.3d 309 (Div. I 2001), even the traditional "discovery rule" for tolling the SOL is obsolete until such time as a period of "continuous representation" ends; in fact that was the precise issue, whether

the latter subsumes and supplants the former, extending the time period even further and despite the fact that a claimant has knowledge of his or her claim. 109 Wn. App. at 662. The Court of Appeals specifically ruled that it did. Id. at 663.

With respect to this, Plaintiffs' counsel specifically argued that this assertion of new and additional facts by Mr. Gay illustrated and highlighted a material issue of fact leaving the court with three options. The first was that the court could strike that segment of the declaration as being nonresponsive and injecting new fact into the record for which the Plaintiffs would have no chance to refute under CR 56. Compare State v. Hudson, 124 Wn.2d 107, 120, 874 P.2d 160 (1994); In re Marriage of Sacco, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990); State v. Pleasant, 38 Wash.App. 78, 684 P.2d 761 (1984) (reply briefing limited to response to issue in brief to which reply is directed); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); Fosbre v. State, 70 Wn.2d 578, 583, 424 P.2d 901 (1967).(arguments raised for the first time in reply brief generally not to be considered to prevent other party from opportunity to respond, and presents court with issue not fully developed). The second would be that the motion should be denied because it exemplified a dispute concerning a material fact. The third was that the Plaintiffs, given this assertion of this new and specific fact, should be granted leave to supplement the record with specific evidence

indicating otherwise, including evidence that Mr. Gay never took any formal steps to advise the trust and its beneficiaries of the ending of his representation.

The judge here would have none of that, and worse, ruled that "I accept Gay's declaration that he no longer represented the trust after 2004". This of course, was in direct conflict with the well-entrenched rule of summary judgment that all doubts be resolved in favor of the nonmoving party, and that if there is some contested issue of material fact then the motion fails. It was as though the judge simply wanted to end the litigation because of the mere passage of time.[12]

Under all of these arguments, the second Gay declaration was objectionable and as a whole subject to being stricken or at least limited. Instead, the trial court used it as a fulcrum for his decision to grant the motion. For those reasons, the trial court's order granting the summary judgment should be reversed.

3. The trial court failed to properly apply the continuous representation rule.

While somewhat overlapping, in terms of argument, this court should consider the roughshod application of the continuous representation rule by the trial court. The trial court seemed to acknowledge that such a rule might

[12] As was argued directly and indirectly by the defense, that the matter was stale and resolved by TEDRA.

apply, but in doing so, generally applied it using the statement from the second Carl Gay declaration. This statement is simply insufficient, standing alone, to allow for the application of the rule because there is insufficient evidence of when the relationship between Mr. Gay and the trust ended. As indicated above, there is no evidence submitted of any formal resignation or withdrawal, and similarly no evidence of a substitution from the other attorney involved in the litigation for the trust, Mr. Taylor. As simple motion to withdraw, or notice of intent to withdraw, or even a substitution form, would be seemingly be readily available, and would presumably have been presented to the court at some time in the underlying litigation. Its absence in the record is indicative that such documents were not there, despite the specific allegations put forth by Plaintiffs in response to the summary judgment motion. In this setting, the idea that Mr. Gay can control a finding of the court as to when his representation of the trust ended is illogical. Thus in Janicki Logging the court made direct reference to two comparable cases in which, under the traditional discovery rule even, the cause did not accrue for purposes of the SOL until the attorney *informed the client* that the attorney would no longer be providing representation. Matson v. Weidenkopf, 101 Wn. App. 472, 482-83, 3 P.3d 805 (2000)(no notice of malpractice until attorney provides actual informs client of withdrawal); Quinn v. Connelly, 63 Wn.App. 733, 821 P.2d 1256 (1992)(fraudulent

concealment tolling ends with actual cessation of attorney client relationship).

The trial court summarily adopted the representation of Mr. Gay that his representation was over in "early 2004", and calculated that the statute would expire sometime in 2007, long before the action was filed. This was a random and arbitrary application of rule, depriving the Appellants here of the opportunity to demonstrate such assertion by Mr. Gay to be inaccurate.[13]

4. The trial court disregarded the plain application of Columbia Gorge.

The trial court ruled that the Columbia Gorge opinion had no application to the claims of the Trust or Foundation. As with the continuous representation rule, a clearly on-point authority, the summary judgment motion somehow managed to omit any reference to Columbia Gorge. Yet the defense cited the case in earlier briefing to the trial court, urging the trial court to adopt – or at least use -- its SOL interpretation of Columbia Gorge to deny the intervention.

Like the principles explored above under the continuous representation rule, those set forth in Columbia Gorge undermine the defense argument for plain application of the three year SOL, beginning in or around, even, 1999, when the trust was drafted by Mr. Gay. In this setting, where intervention

[13] As indicated to the trial court, and set forth otherwise here, to the best of this counsel's knowledge, there never was any notice of withdrawal to the trustee or beneficiaries.

occurs, Columbia Gorge is a controlling precedent. Columbia River Gorge Audobon Society v. Klickitat County, 98 Wn. App. 618, 989 P.2d 1260 (1999). There the trial court was reversed when it ruled that statutes of limitation override any competing analysis under CR 24. In so doing the Court of Appeals discussed the interplay between the two rules, and clearly indicated that the latter – CR 24 – is controlling in the absence of specific statutory provisions indicating otherwise. 98 Wn. App. At 627.

> It is the right to bring an independent action, *not the right to intervene*, that is subject to applicable statutes of limitation.

Id. At 625. Further, the losing party in Columbia Gorge specifically urged the court to create a rule based on "two classes of intervenors: intervening plaintiffs who are subject to statutes of limitation, and intervening defendants for whom intervention is timely until appellate mandate is filed." Id. The court then stated, quite simply, "[n]othing in the rule or the case law supports such a distinction." Id.

The major thrust of the defense briefing in the trial court focused on a generic application of the SOL to either the Trust or the Foundation. With respect to the Trust, the defense briefing attempted to get the trial court to consider certain facts which are not provided to the court through any form of declaration. It asserted that the Trust, through some independent counsel, "made a decision not to pursue any malpractice action". Similarly, the trial

court seemed to be convinced by the idea that the Foundation "could have been formed anytime by anyone" and that Mr. Gay did nothing to stop anyone from forming it. There is no declaration from the supposed independent counsel, Mr. Taylor, to this effect. Similarly, there is no indication of any declaration from Mr. Smith, who was a trustee at one point in time.

In fact, there were additional facts to be made known to the court concerning the potential application of the SOL. The intervenors were prepared to litigate this issue in an appropriate setting. With no specific evidence on this aspect of the case, questions about the potential application of the SOL should have been left to another day. In other words the motion was not properly supported by sworn testimony. In that circumstance the Trust would demonstrate that the delay in presenting this claim to the court was attributable in large measure to the suppression of documentation which reveals some of the details which could have been made known to the trial court.[14]

Nonetheless, much of that argument is beside the point. Under Columbia Gorge none of this analysis was necessary, as the intervention had been granted. In this case, in particular, the policy considerations reconciled

[14] This action was brought within three years of the disclosure and release of *some of* the documents provided to Ms. Linth, but not all, namely those withheld under a dubious claim of attorney-client privilege.

in Columbia Gorge are evident. Mr. Gay knew that he was subject to a malpractice action for the events surrounding the estate and trust. He had voluntarily entered into a series of tolling agreements with Ms. Linth over the ensuing years. Moreover, he was officially notified of such facts years before, probably within the first year. He knew and realized malpractice claims were in the air indirectly when the estate litigation began, and then more directly, sometime earlier in 2004 when his client Mr. Doran signed the TEDRA which reserved the malpractice claims of Ms. Linth and her mother against him, and then precisely in 2009, when Ms. Linth filed her malpractice action against him. CP: 357-369, 913-925. In the meantime, as is pointed out elsewhere here, the estate litigation was continuing to evolve, and spin out of control for him.

After the malpractice case was filed Mr. Gay actively defended against it. Thus, under the rationale of Columbia Gorge the rationale for a strict SOL application was absent. Such is especially true here as the claims of the Trust and the Foundation emanate from the same set of facts. This analysis simply renders the other SOL arguments moot, and should have been cause for the trial court to reverse its summary judgment ruling. Instead the trial court proclaimed this controlling precedent to be inapplicable. The trial court therefore must be reversed.

5. The trial court should have ruled that the SOL was tolled as to the Foundation.

The trial court adopted the rhetoric of the defense that the Foundation could have incorporated "at any time". The motion goes further to say that "no approval or consent from Mr. Gay was ever required". As pointed out otherwise here, Mr. Gay was effectively in control of the Foundation during the salient times at issue here, specifically during the negotiations pertaining to the disposition of Green Point. *He vetoed the Foundation plan and declared that the First Amendment was legally invalid, setting the stage for TEDRA and thereby effectively excluded the Foundation from participation in TEDRA.* He filed documents with the court which explained why he, in his judgment, decided that the Foundation should not be formed. So long as he was representing the Trust or otherwise controlling or influencing the trustee, and moving the matter toward TEDRA, he was defining the terms of the TEDRA, as the trustee was the person charged with the responsibility of forming the Foundation[15]. This behavior brings the matter squarely within the principles of not only of continuous representation, but also fraudulent concealment, especially in a fiduciary setting; that behavior tolls the SOL:

[15] Recall here that the trustee actually paid part of the seed money for the Foundation creation, and that there was general acknowledgement that such money would come from the trust.

The second category of cases does not depend upon evidence of fraudulent concealment. Rather, courts apply the doctrine where the nature of the plaintiff's injury makes it extremely difficult, if not impossible, for the plaintiff to learn the factual elements of the cause of action within the specified limitation period. Accordingly, Washington courts have extended the application of the discovery rule to a variety of tort actions including: professional malpractice actions, product liability actions, the failure to comply with mandatory self-reporting environmental law, and libel suits against ex-employer. We need not decide whether the rule should also be applied to conversion actions because this case falls within the first category.

There are two ways to establish fraudulent concealment or misrepresentation. The plaintiff may affirmatively plead and prove the nine elements of fraud or may simply show that the defendant breached an affirmative duty to disclose a material fact. *Stiley v. Block,* 130 Wash.2d 486, 515-16, 925 P.2d 194 (1996) (Talmadge, J., concurring); *Oates v. Taylor,* 31 Wash.2d 898, 902-03, 199 P.2d 924 (1948). Either method of proof will activate the statutory discovery rule for fraud, RCW 4.16.080(4). Viewcrest Co-op. Ass'n, *Inc. v. Deer, 70 Wash.2d* 290, 295, 422 P.2d 832 (1967). In the present case, Crisman did not plead the nine elements of a traditional fraud action. Her evidence, however, was sufficient to prove that Uhlich and Robert owed her an affirmative duty of candor and breached that duty.

Absent an affirmative duty to disclose material facts, a defendant's silence does not constitute fraudulent concealment or misrepresentation. *Favors v. Matzke,* 53 Wash.App. 789, 796, 770 P.2d 686, review denied, 113 Wash.2d 1033, 784 P.2d 531 (1989). When a duty to disclose does exist, however, the suppression of a material fact is tantamount to an affirmative misrepresentation. *Washington Mut. Sav. Bank v. Hedreen,* 125 Wash.2d 521, 526, 886 P.2d 1121 (1994); Oates, 31 Wash.2d at 902, 199 P.2d 924.

A fiduciary relationship arises between an agent and a principal when the agent, without the knowledge and consent of the principal, exercises dominion and control over the principal's property sufficient to alienate the principal's right to the property. *Moon v. Phipps,* 67 Wash.2d 948, 955-56, 411 P.2d 157 (1966). Once a fiduciary relationship arises, the agent has a duty to act in the utmost good faith, to fully disclose all facts relating to his interest in and his

> actions involving the affected property, and to deliver all benefits derived from or inuring to the property from the breach to the principal. Moon, 67 Wash.2d at 956, 411 P.2d 157.

Crisman v. Crisman, 85 Wn. App. 15, 20-22, 931 P.2d 163 (1997).

Similarly, the defense and the court seemed to be vexed by the fact that the Foundation was allowed to intervene in the matter, and further, as to how the SOL might apply to it. The Plaintiffs argued that the SOL could not run against an entity that had not be formed, until it was formed, and further with respect to Mr. Gay, he was fully aware, from his[16] review of the Butler report, that the Foundation should be formed and included in the TEDRA discussions. This of course was quite inconvenient for all other participants as the Foundation would potentially be the spoiler; its interest overarched all others – to the pie they all were about to divide. That claim emanated, of course, from a legitimate legal position that the First Amendment *did not fail*. By contrast, Crista Ministries, who by all accounts was not to receive Green Point, nor any other portion of the Plant Estate *because of the First Amendment*, was allowed to participate in TEDRA. This was absolutely abhorrent to the intent of Mrs. Plant, as was

[16] Mr. Gay was responsible for engaging Mr. Butler, as illustrated by the correspondence between the two, although the Butler billings were paid from the Trust.. Mr. Gay engaged him to help him (Mr. Gay) decide what to do with the First Amendment problem. Ultimately, Mr. Gay cherry picked those portions of the Butler report that suited him, namely that the First Amendment "failed", using it as a fulcrum for the TEDRA proceedings, but disregarding that segment of the Butler report that called for the formation of the Foundation. Also, as discussed otherwise herein, Gay disregarded the conflict warnings issued by Butler.

plain and evident to everyone because of the language in the First Amendment, regardless of any argument about its validity[17]. Everyone participating in TEDRA had to have known and understood this, and therefore deliberately and consciously decided to ignore it.

Despite this, *before* TEDRA began, in the 6-9 months following the death of Mrs. Plant, Carl Gay endorsed the validity of the First Amendment and the corresponding creation of the Foundation. CP: 385-391.

Mr. Gay has gone on then and now to announce that he and Mr. Doran aborted the Foundation, and him in particular, as a "fact witness", because the ultimate Foundation plan did not comport with what he claimed to be the wishes of Mrs. Plant. CP: 350-355 (footnote. 1), 410.

In particular, the foundation plan presented was objectionable to Mr. Gay because it appeared to create control over the Foundation with the Linth family.

> Plaintiffs neglect the real reason for the present litigation, namely, the fact that neither I nor trustee Dan Doran would endorse Jennifer Linth and her sister Claudia's creation of a Foundation that did not reflect the wishes of the decedent, Evelyn Plant.

CP 350-355, footnote 1.

[17] And in stark contradiction to Mr. Gay's self-professed mission to ensure that the intent of Mrs. Plant for her estate be preserved by preventing the Foundation from being formed. The premise of TEDRA was the *legal conclusion* that the First Amendment failed.

On this matter, Mr. Gay further earlier acknowledged that he might become a "fact witness" on such matters. CP: 410.

So, Mr. Gay purposefully stopped the Foundation plan and planning in its tracks, notwithstanding his other statements and allegations of foisting all decision making in this matter to the now deceased trustee Doran. He personally took the position that he was no longer going to allow the intent of Mrs. Plant to have her property owned by the Foundation fulfilled because she was somehow, according to his argument, being double-crossed by the Linth family. In acknowledging the Foundation and the efforts to complete the formation of the Foundation after the death of Mrs. Plant, he acknowledged the validity of the First Amendment. At the moment of Mrs. Plant's death, therefore, the "to-be-formed-upon-death foundation" had the status of any other estate beneficiary. Again, to each of these beneficiaries, including most vividly (and egregiously) Crista Ministries, Mr. Gay ultimately represented in various ways there was a duty and responsibility to include them in the ensuing and yet-to-be-christened estate litigation and later, the TEDRA proceedings. Why not then the Foundation?

It is additionally worth noting at this point in time that the relationship between Mr. Gay and the Linths had deteriorated to the point of litigation, such that Mr. Gay and the Linths were very much in an adversarial setting. It was at this crossroads that Mr. Gay entirely abandoned the

concept of the validity of the First Amendment, despite his support of it to that point, and decided that it was invalid, and thereby aborted and abandoned the efforts to form the Foundation. Most importantly, by his own admission, this change of course was motivated by a fundamental disagreement between he and the Linths with respect to the Foundation plan. Of further import here was the fact that lurking behind all of this was the charge of malpractice from the Linth family being levied against Mr. Gay from some time earlier; there was an opportunity to kill two birds with one stone. These facts make dubious the Carl Gay party-line narrative that 1) the First Amendment was legally defective, and 2) there could be no further inclusion of the Foundation.

But moreover, instead of doing a one-eighty reversal, Mr. Gay had other choices, as was pointed out by Mr. Butler. Rather than abort the Foundation, he could have went forward with the formation before a court, or at least as much formation as was necessary to insure the Foundation claim was part of the TEDRA solution. Some intermediate action, short of his veto, could have preserved the Foundation claim. Most probably he didn't do this because he did not want to deal with the Linths on this matter. By acting as he did, he headed them off at the pass, such that he remained the ultimate arbiter of the intent of Ms. Plant with regard to the Foundation, and most particularly, the dispute about the composition of its Board of

Directors. The "failed first Amendment" was disinformation, a red, red herring that conveniently provided legal camouflage for what truly was a purposeful decision to exclude the Linths from any grander participation in the management of the estate, and most importantly any direct or indirect claims to Green Point.

The trial court asked and the defense argued that Mr. Gay "could not have a duty to something that did not exist". To the Foundation, especially given these circumstances, this observation is immaterial. Putting aside the Columbia Gorge analysis set forth above, which should apply equally to the Trust and Foundation, the SOL for the Foundation should be deemed to have been tolled until such time as the Foundation's formation was completed. This can and should be supported under any of a number of theories, but must appropriately under the rubric of the SOL, under principles of fraudulent concealment, especially in a fiduciary setting, as set forth above. For it was the conscious and purposeful and intentional decision by Mr. Gay, based upon his own conflict with the Linths, to prevent the Foundation from being formed *in any form* such that it would ultimately be able to participate in TEDRA. Nobody anywhere in all of this has ever argued that the Foundation would not have a claim in the TEDRA; it is just that such claim threatened to override the entire reason for it in the first place. And not too

incidentally, that inclusion would highlight the defective drafting of Mr. Gay *ab initio.*.

The Foundation was formed in 2011. In that sense, the facts here are certainly unique. Had it not been for the deliberate decision by Mr. Gay to proclaim the First Amendment void, it would have been formed in 2001. Mr. Gay fully understood this. He also knew that not forming the Foundation, *in some form*, would frustrate the intent of Mrs. Plant for Green Point. It in effect tossed it out the window. The veto of the Foundation plan, along with the promotion of the TEDRA which called for the liquidation of the property, amounted to a full scale betrayal and sell-out of that representation of Mrs. Plant and not incidentally the Foundation itself. The trial court should have ruled, above and beyond the Columbia Gorge analysis, that the SOL was tolled until the Foundation was formed in 2011. The intervention then came well within the three year statute.

VI. CONCLUSION

The court errantly granted the summary judgment motion. The second Gay declaration should have been fully or partially stricken; alternatively the motion should have been denied or the Plaintiffs given more time to rebut the assertions concerning the ending of Gay's Trust representation. Regardless, with respect to Trust and Foundation, the SOL is

controlled by the Columbia Gorge opinion which the trial court expressly decided not to follow. Finally, Mr. Gay's conflicted veto and termination of the well-developed plans for the Foundation, effectively scuttling its formation, should be viewed as tolling the SOL as to it, such that the intervention, on that basis separately, was timely. The trial court's summary judgment SOL dismissal should be reversed with instructions to proceed to trial.

Respectfully submitted this 1st day of May, 2015.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. I hereby certify that on May 1, 2015, I caused true and correct copies of the AMENDED OPENING BRIEF OF APPELLANTS, THE EVELYN PLANT TESTAMENTARY TRUST AND THE FRANKLIN AND EVELYN PLANT GREEN POINT FOUNDATION document to be electronically filed with the Clerk of the Court using the JIS -Link system, and which Clerk of Court will send notification of such filing to the following via email:

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