NO. 45250-2-II

COURT OF APPEALS STATE OF WASHINGTON
DIVISION II

JENNIFER LINTH AND THE ESTATE OF CAROLYN LINTH; THE EVELYN PLANT TRUST, AND THE FRANKLIN AND EVELYN PLANT GREEN POINT FOUNDATION,

Appellants.

v.

CARL GAY AND ROBIN A. GAY, HUSBAND AND WIFE, AND THE MARITAL COMMUNITY COMPOSED THEREOF; GREENAWAY & GAY, A WASHINGTON LEGAL PARTNERSHIP; GREENAWAY, GAY & ANGIER, A WASHINGTON LEGAL PARTNERSHIP; GREENAWAY, GAY & TULLOCH, A WASHINGTON LEGAL PARTNERSHIP; and DANIEL W. DORAN and CAROL DORAN, HUSBAND AND WIFE, AND THE MARITAL COMMUNITY COMPOSED THEREOF,

Respondents.

BRIEF OF RESPONDENT GAY

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I. INTRODUCTION

More than fourteen years ago, in July of 2000, Port Angeles lawyer Carl Gay ("Gay") drafted estate planning documents, including a revocable living trust ("the Trust"), for his elderly client, Evelyn Plant ("Evelyn"). Evelyn's friend, Carolyn Linth, and Carolyn's daughter, Jennifer Linth, appellants herein (collectively "the Linths"), were named among the beneficiaries of the Trust. A month after signing the Trust, Evelyn desired to make certain changes in her estate plan primarily with regard to her personal residence, and the pristine 60 acres upon which it sat, known as Green Point ("Green Point").

On July 22, 2000, Evelyn signed the Trust, naming herself as the sole trustee. On August 16, 2000, Gay prepared and Evelyn signed a document by which she resigned as trustee of the Trust and her long-time friend and trusted personal banker (and now a co-defendant in this action), Dan Doran ("Doran") became the successor trustee of the Trust. With Evelyn's blessing, Gay continued as trust counsel to Doran.

On August 22, 2000, Doran and Claudia Smith ("Claudia"), the daughter of Carolyn Linth and sister of Jennifer Linth, went to Gay's office. They instructed Gay to prepare an amendment ("the Amendment") to the Trust which provided for the establishment of a charitable

foundation as well as for the deleting of some beneficiaries of the Trust and the addition of others.

The Amendment was to include the creation of a plan ("the foundation plan") for a foundation to use Green Point for religious purposes (e.g. church retreats, respite for clergy and missionaries, youth programs, etc.). The foundation was to be named The Franklin and Evelyn Plant Green Point Foundation ("the Foundation"). Based upon Gay's understanding from consultations with Evelyn, she envisioned an independent board of trustees for the Foundation composed of church and community leaders (e.g. the then-serving pastor of certain churches, the then-serving local mayor and school superintendent, the then-serving field executives of the Boy and Girl Scouts, etc.) based upon the well-established K.O. Erickson Trust in Port Angeles. Jennifer Linth was to reside in the Green Point residence as the on-site caretaker and her occupancy was to be subordinated to the church-related uses of Green Point. (CP at 629).

In August of 2000, while Gay was out of the office on vacation, Trustee Doran requested a copy of the draft amendment from Gay's office. Without Gay's direction or prior knowledge, Doran then took the draft to Evelyn and obtained her signature, which he later had notarized. There was no foundation plan at this point. Doran and Evelyn charged Jennifer

Linth's sister, Claudia Linth Smith, to begin preparing a foundation plan, which was presumably to be attached to the Amendment once Evelyn approved it. Gay was not involved in the decision to retain the services of Ms. Smith, nor was he charged with overseeing her activities in preparing a foundation plan. Ms. Smith reported to Evelyn and Doran. Doran paid $10,000 to Ms. Smith for her work. (CP at 268).

When Evelyn died unexpectedly on January 1, 2001, there was a signed amendment to the Trust, but no approved and finalized foundation plan. The later foundation plan proffered by Ms. Smith was at wide variance with the intent which Evelyn had conveyed to both Doran and Gay. While Evelyn had intended for Green Point to be a religious retreat and recreation center, it seemed that under Ms. Smith's proposed foundation plan Green Point was to become the 'Linth family retreat center.' Doran, with Gay's concurrence, would not 'go along with' the proposal to simply attach the pro-Linth-family post-death "foundation plan" to the Amendment.

Conflicts arose between beneficiaries of the original Trust and beneficiaries under the terms of the signed Amendment. A mediation was conducted, resulting in a May, 2005 agreement which addressed the interests of the various parties. Although the Linths were represented by counsel and voluntarily agreed to the terms of resolution, it was not long

thereafter that they sought, unsuccessfully, to undo the settlement, as to them. That matter is the subject of a separate appeal, NO. 41285-3-II.

Although the Linths remained as beneficiaries under both the Trust and the Amendment, they contend that they were short-changed and that Doran and Gay were to blame. The Linths threatened suit and Gay cooperatively agreed to a series of statute of limitations tolling agreements. When Gay refused to renew the tolling agreement in 2009, however, the Linths filed suit.

In February of 2011, Jennifer Linth created the Foundation, with herself in charge. In October of 2011, the Foundation, through Ms. Linth, and the Trust, through Ms. Linth as successor trustee, moved to intervene in this matter, and contended that Gay had breached duties owed to them when he failed to finalize the Amendment by attaching a foundation plan. Of course, there was no foundation plan.

After intervention was granted, Gay moved for summary judgment dismissal against the Trust and the Foundation, claiming the three-year statute of limitations for legal malpractice had long since expired. The Hon. Keith Harper granted Gay's motion, found the statute of limitations had run in 2007 or, at the latest, by October of 2008, and the intervenors had failed to file their claims prior to October 1, 2011. Hence their claims were stale and time-barred.

Following dismissal of the Trust and the Foundation, Gay moved for summary judgment against the Linths. The same trial judge granted Gay's motion for summary judgment, applying the multifactor balancing test of *Trask v. Butler* and finding the Linths were never non-clients to whom Gay owed a duty as a lawyer. The Linths and the intervenors appeal both decisions.

II. ASSIGNMENTS OF ERROR

Issue One: Whether an intolerable conflict of interest arises upon the imposition of a duty on an attorney to third party beneficiaries, who he has not represented, and who have other avenues of recourse?

Issue Two: May a litigant sue a trustee *and* the trustee's attorney?

Issue Three: Whether the trial court properly granted summary judgment to Gay against the Trust and Foundation because the statute of limitations had expired?

III. COUNTER-STATEMENT OF THE CASE

Carl Gay was retained by Evelyn Plant to prepare a Trust for the disposition of certain assets, including a large parcel of real estate known as "Green Point". A trust document was prepared and formally executed by Evelyn on July 22, 2000. Shortly thereafter, Evelyn wished to make changes to her Trust. An Amendment to the Trust was prepared in draft form by Gay. A copy of that draft was obtained from Gay's office and

delivered to Evelyn by Dan Doran, the future trustee of the Trust. Doran obtained Evelyn's signature on the Amendment on August 22, 2000. The Amendment contained changes to the Trust, including the creation of a Foundation, and also referenced an attachment, which would set forth certain provisions for administration, management, and control of the Foundation. At the time Evelyn signed the Amendment there was no attachment and no plan yet existed. This attachment was to be completed by Linth's sister, Claudia Smith. (CP at 266, 629). Evelyn died unexpectedly on January 1, 2001. At the time of her death, the attachment to the Trust Amendment had not been created.

Without the referenced attachment, the Amendment to the Trust was therefore incomplete and subject to challenge, especially by those whose interests were affected by either the adoption or non-adoption of the Amendment.

Conflict intensified between those parties affected by disputes over the validity or non-validity of the Amendment, including the Linths. As of the summer of 2004, Doran was primarily represented by attorney Brooke Taylor, as Gay's involvement sharply declined and ended completely in 2004. (CP at 351). Finally, a non-judicial dispute resolution agreement ("NDRA"), dated May 2005, was agreed upon and signed by the affected parties, including the Linths, and entered by the

Court in October 2005. (CP at 474, Ex. A). The primary asset of the Trust, Green Point, was to be sold and the proceeds divided among the contending parties. Gay's former client, trustee Doran, resigned as trustee once the NDRA was signed by the Court, October 5, 2005. Jennifer Linth's brother-in-law, Glen Smith, was named successor trustee at that time. Gay never represented Smith in any trust matters, as Smith had his own, independent counsel.

While under the counsel of several different attorneys, the Linths signed the NDRA. In recent years the Linths have attempted to rescind the NDRA. (CP at 373, Ex. 2). However, despite these multiple and unsuccessful efforts, they stand to benefit significantly upon the sale of Green Point. Smith resigned as trustee in September 2008 and Jennifer Linth became trustee. Since the time Evelyn passed away, January 1, 2001, Jennifer Linth has enjoyed the present and past (14+ years) benefit of continuous residence at Green Point.

As set forth above, various actions have been commenced, all involving the Linths, either directly or indirectly. For example, the intervenors, including the Trust represented by Jennifer Linth as trustee and the Foundation represented by Jennifer Linth as its director, filed their complaint in 2012, which was in a form essentially identical to the Linths' individual action commenced in 2009. (CP at 913, 505). These

complaints primarily center on allegations of Gay's actions in 2000 and 2001, citing nothing beyond the year 2001.

IV. SUMMARY OF ARGUMENT

The trial court's October 18, 2013, order granting Gay's Motion for Summary Judgment against the Linths should be affirmed as Gay owed no duty to these parties before or after Evelyn's death.

All parties agree that Gay owed certain duties to Evelyn and later, to Doran, after he became the successor trustee of the Trust. The disagreement, which is central to this appeal, is whether beneficiaries may require that an attorney's duties extend also to them. Relevant case law in Washington State is clear that, except in certain unusual or extraordinary circumstances, an attorney's duty is to the client, and not to other non-client third parties.

Evelyn hired attorney Carl Gay to draft estate planning documents for her, thereby creating an attorney-client relationship between Evelyn and Gay. As a result of that attorney-client relationship, Gay owed Evelyn, as his client, a duty of care *and a duty of loyalty.* Additionally, after Evelyn resigned as trustee of the Trust, Doran became the successor trustee. Doran elected to hire attorney Gay to represent him in his capacity as trustee of the Trust and thus Gay now owed Doran a duty of care *and a duty of loyalty.* Conversely, the Linths, who were beneficiaries

of the Trust, were not clients of Gay and, therefore, were not owed similar duties.

Naturally, the Linths' appeal must, of necessity, focus on those limited instances in which courts have construed a duty owed to certain non-client third parties. Such are the exception, not the rule.

For example, only when a non-client third party's interests are aligned with the client *and* the third party has no alternate recourse by way of remedy, a court *may* find a duty. Of course, in the present action, the Linths demonstrated through their actions that they understood the alternate avenue of recourse available to them was to file suit against trustee Doran. However, Doran declined to bring claims against his attorney, Gay. Gay did not, and *could not*, owe a duty of care or loyalty to the Linths while he represented Evelyn or Doran, as that would have created an intolerable and insurmountable conflict of interest for Gay.

With respect to the intervention of the Trust and the Foundation, the statute of limitations has run against both parties. Gay ceased representing the trustee, Doran, in 2004. Moreover, Doran was effectively no longer the trustee as of May of 2005, when the NDRA was agreed to by Doran, the Linths, and all other parties. As such, the doctrine of continuous representation no longer applied as a new trustee, Glen Smith, took over as trustee with access to all trust documents. (CP at 481).

Regardless, the complaints filed by both the Linths and the intervenors were drafted in 2003 by one of the Linths' several attorneys. (CP at 357, 503, 913). It is clear from the record, and lack of evidence produced by the Linths, that the trial court's ruling that each of these parties had full knowledge of the underlying claims many years ago was well-founded. As such, the trial court's order granting summary judgment against the Trust and the Foundation, based on the expiration of the statute of limitations, should be affirmed.

V. ARGUMENT

A. The standard for review is *de novo.*

Summary judgment orders are reviewed *de novo*. *Parks v. Fink*, 173 Wn. App. 366, 374, 293 P.3d 1275 (2013), *review denied*, 177 Wn.2d 1025 (2013). On appeal, the Court considers the facts and reasonable inferences in the light most favorable to the non-moving party; the same inquiry as the trial court. *Id.* citing *Jones v. Allstate Ins. Co.,* 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

The purpose of summary judgment is "to examine the sufficiency of the evidence behind the plaintiff's formal allegations in the hope of avoiding [an] unnecessary trial" where there is no genuine issue as to a material fact. CR 56; *Zobrist v. Culp*, 18 Wn. App. 622, 637, 570 P.2d 147 (1977). Summary judgment should be granted where the moving party

can point to the absence of evidence supporting each element of a claim and the plaintiff fails to provide evidence supporting his claim. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 230, 770 P.2d 182 (1989) (holding "it is unjust to subject defendants to a trial in the absence of a showing that the plaintiff can make out a prima facie case"). Specifically, plaintiffs must set forth specific facts rebutting the moving party's contentions and disclose that a genuine issue as to a material fact exists. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). In short, where the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," the trial court should grant the summary judgment motion. *Young*, 112 Wn.2d at 230, quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, (1986).

B. General law related to attorney malpractice.

A legal malpractice action is a negligence action which requires a showing of the following four elements: (1) An attorney-client relationship which gave rise to a duty of care; (2) breach of that duty by an act or omission; (3) the client was damaged; and (4) the breach was a proximate cause of the client's damages. *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992). Whether or not a duty is owed to a non-client

beneficiary is a question of law. *Parks v. Fink*, at 377, citing *Folsom v. Burger King*, 135 Wn.2d 658, 671, 958 P.2d 301 (1998).

C. The Trial Court correctly granted Gay's motion for summary judgment against the Linths because Gay did not owe a duty of care to the Linths

It is well-established that the Linths were not clients of Gay for the events at issue here. As such, they were third parties to his attorney-client relationships with Evelyn, the trustor, and Doran, the trustee. In *Trask v. Butler,* our Supreme Court adopted a multifactor balancing test to determine whether an attorney owes a duty to a non-client. That test provides consideration of the following:

1. the extent to which the transaction was intended to affect the plaintiff,
2. the foreseeability of harm to the plaintiff,
3. the degree of certainty that the plaintiff suffered injury,
4. the closeness of the connection between the defendant's conduct and the injury,
5. the policy of preventing future harm, and
6. the extent to which the profession would be unduly burdened by a finding of liability.

Trask v. Butler, 123 Wn.2d 835, 841, 872 P.2d 1080 (1994).

With very few exceptions, Washington courts do not recognize a duty owed to non-client beneficiaries for delay or negligence in the preparation of testamentary documents. However, in limited

circumstances, our courts have found that an attorney *may* owe a duty to a non-client in a probate case context. See for example *In re Guardianship of Karan*, 110 Wn. App. 76, 38 P.3d 396 (2002). In that case, an attorney drafted guardianship documents for a guardian, who was his client, on behalf of and for the benefit of a minor ward (the incapacitated daughter of the guardian), who was not his client. The attorney failed to require the guardian be bonded and also failed to secure the ward's funds in a blocked account. The guardian (who was later shown to be judgment-proof) depleted the bank account of the minor and then abandoned her. Because it was the attorney's negligence which resulted in no bond being required and the accounts not being blocked, and the guardian/mother having absconded, there was no person from whom the ward could recover other than the attorney.

The *Karan* court found the purpose of the attorney-client relationship between the attorney and the guardian was to preserve the non-client minor ward's property through properly executed guardianship documents, thus exclusively benefitting the non-client minor ward, and found that a duty existed. *Karan, id.* at 85. In *Karan,* the ward's mother acting in her capacity as her daughter's guardian, depleted the ward's property and abandoned the ward. *Id.* at 79. In holding the attorney owed a duty to a non-client, the court reasoned that under those unique facts,

where the guardian's lawyer failed to secure a bond or require blocked accounts, and where the minor ward had no recourse against anyone other than the lawyer, policy considerations encouraged finding a duty on the part of the guardian's attorney to protect the minor ward, a person with little to no legal recourse, from future harm. *Id.* at 85, citing *In re Guardianship of Ivarsson*, 60 Wn.2d 733, 738, 375 P.2d 509 (1962). (1995).

In the instant case, the Linths are clearly not minor wards nor was Gay hired to preserve their property, as was the case of the guardian's lawyer in *Karan*. In *Karan,* there were no competing beneficiaries, where here Evelyn had multiple specific beneficiaries in addition to the numerous residuary beneficiaries. In addition to the NDRA, voluntarily entered into by the Linths with the assistance of two Seattle law firms, the Linths had other means of recourse aside from pursuing legal action against Gay. The Linths could (and indeed did) sue Doran, the trustee. As the facts demonstrated, Doran, as trustee of the Trust, made all decisions regarding rejection of Claudia Smith's foundation plan, early distribution of bequests, not remaining in contact with Gay while a foundation plan was being created, etc.

Conversely in *Karan*, the minor ward had no ability to preserve her own property or pursue legal action against anyone but the attorney.

Thus, absent another remedy, the policy was established to protect a minor ward's rights and property. In light of the limited purpose for the policy considerations established in *Karan* and the fact no other Washington court has created a duty to non-clients when other forms of recourse are available, the Linths' response to Gay's summary judgment motion falls far short of establishing a duty between Gay and the Linths.

The Linths citation to *Stangland v. Brock*, 109 Wn.2d 675, 747 P.2d 464 (1987) is misplaced. Holding that there was no duty to non-client third party beneficiaries who did not receive the principal asset of the estate, which they believed the testator intended for them to have, the court in *Stangland* said that a duty *may* be found for estate beneficiaries if, among other factors, "the beneficiaries could not recover for the attorney's alleged negligence, no one could".

The unique language of this factor was clarified in *Trask v. Butler* to mean an attorney could not be held liable by a non-client beneficiary of a testamentary instrument if that beneficiary had recourse (i) to sue the fiduciary acting under that instrument or (ii) to petition the probate court to direct the fiduciary to do or abstain from doing any particular act in his fiduciary capacity or petition for removal of the fiduciary. The *Trask* court clarified this factor as follows:

> In Stangland v. Brock, 109 Wn.2d 675, 747 P.2d 464 (1987), we acknowledged the right of an estate beneficiary to bring a cause of action against an attorney under the multifactor balancing test and the third party beneficiary test for errors in drafting a will. In finding a duty to beneficiaries under the multifactor balancing test, we recognized **"if the beneficiaries could not recover for the attorney's alleged negligence, no one could."** Stangland, at 681 (emphasis supplied). This rationale is inapplicable to the facts in this case since estate beneficiaries have two preexisting legal procedures to protect their interest in the estate. Foremost, the personal representative owes the beneficiaries of an estate a fiduciary duty to act in the estate's best interest. (citation omitted). If the personal representative's conduct falls below this standard, the estate beneficiaries may bring a cause of action against the personal representative for breach of fiduciary duty. (citation omitted). By directing estate beneficiaries to file suit against the personal representative for breach of fiduciary duty, we properly place the emphasis of estate decision making upon the correct individual, the personal representative. It is important to note, attorneys hired by a personal representative are not shielded from legal malpractice by this rule. If an estate attorney negligently advises a personal representative, the attorney may be liable to the personal representative for any legal malpractice.
>
> Second, estate beneficiaries are protected against attorney malpractice or a breach of fiduciary duty by the personal representative, or both, if the estate beneficiaries are willing to take a proactive role in estate matters. RCW 11.96.070(2) permits estate beneficiaries to request a judicial proceeding to direct the personal representative to do or abstain from doing any particular act in their fiduciary capacity. Similarly, an estate beneficiary can protect his or her interest in the estate by having the personal representative removed if the personal representative breaches a fiduciary duty to the estate. RCW 11.68.070; RCW 11.28.250. *Trask v. Butler* at 843-844.

As determined by Judge Harper, this case is controlled by the recent case of *Parks v. Fink* (cited above). That decision from Division I

of this Court evaluated the *Trask v. Butler* factors within a fact scenario which is essentially identical to the matter here.

In *Parks v. Fink* (hereinafter *Parks*), the court considered whether a beneficiary under a will could maintain an action against the lawyer who drafted the will but who failed to timely obtain a properly executed final will. *Parks,* 173 Wn. App. at 366. There, attorney Fink was retained by Mr. Balko to prepare an amendment to his will. *Id.* at 367. A draft of the will was delivered by Fink to Mr. Balko while he was hospitalized. He filled in some of the blank spaces and later signed it outside of Fink's presence and not in the presence of witnesses or a notary, and this fact, as well as the consequent non-enforceability of the signed instrument, was known to his attorney, Fink. *Id.* at 369-70. As such, there were intended and known beneficiaries in the new will which was not properly executed.

Over one year passed and during that interval, Ms. Fink failed to have the draft will formally executed. *Id.* Upon Mr. Balko's death, a beneficiary, Parks, was deprived of the benefits he would have received if the subject will had been properly and timely executed. *Id.* at 371-72. Parks brought a claim against attorney Fink, contending that Fink owed a duty to him, a non-client beneficiary of the estate of Mr. Balko. *Id.* at 373.

The *Parks* court considered ***only two*** of the *Trask* factors: (5) the policy of preventing future harm and (6) the extent to which the profession would be unduly burdened by a finding of liability. *Id.* at 378. Parks' claim was summarily dismissed by the trial court and Parks appealed. Division I, in affirming the trial court, concluded its opinion with these words:

> Parks argues that absent a duty, he lacks a legal remedy against Fink. **Imposing a duty even under these circumstances could diminish the attorney's duty of undivided loyalty to the client and impose an untenable burden on the attorney-client relationship. On balance, we conclude that the risk of interfering with the attorney's duty of undivided loyalty to the client exceeds the risk of harm to the prospective beneficiary.** For the reasons discussed above, we join the majority of courts that have considered the issue and hold that an attorney owes no duty of care to a prospective will beneficiary to have the will executed promptly. *Id.* at 388-89 (emphasis supplied).

The Court considered the burden imposed upon the legal profession by allowing claims by non-clients against attorneys and found that, except in limited instances as discussed above, the allowance of such claims would unduly burden the legal profession. *Id.*

Understandably, the Linths are attempting to distance and distinguish their appeal from the holding in *Parks.* However, the *Parks* decision is dispositive. The Linths *must* somehow distinguish their case

from *Parks*. As Judge Harper ruled as a matter of law, *Parks* is indistinguishable from the case at bar.

In *Parks*, a will was written but the testator failed to properly sign the will. This is, in effect, what happened here as Evelyn failed to properly execute the Amendment to the Trust. (RP 10/18/13 at p. 39, ll. 6-11). Specifically, Evelyn signed the Amendment to the Trust (which had been properly executed) which amendment changed the dispositive scheme of the Trust, giving the Linths a greater interest in Green Point. However, Evelyn failed to properly sign the Amendment because there was no foundation plan yet in existence and thus none attached to the Amendment, contrary to the incorporation by reference of a foundation plan. Thus, the Amendment, just like the updated will in Parks, failed and the distribution of property was not changed per the Amendment.

The *Parks* court considered "whether a duty is owed to an intended beneficiary where the attorney fails to ensure the decedent executes the will promptly." *Id.* at 379. While the Linths continually attempt to steer this Court *away* from the *Parks* decision through false assumptions, misstated facts, and an incorrect understanding of the law, Judge Harper's analysis, as identified above, is on point. Of course, unlike the facts of *Parks*, the Linths have an alternate recourse against the trustee, Doran. *Id.* at 387.

Imposition of such a duty upon a lawyer in Gay's position would create a conflict of interest between the client, third party beneficiaries (not only the Linths but the residuary charitable beneficiaries), and the attorney. The prospect of pressuring a client to formalize a testamentary document, for fear of liability to any beneficiary, detracts from an attorney's absolute duty of loyalty to the client. *Parks* at 388-89.

Washington courts have found that a conflict of interest arises in estate matters whenever the interest of the personal representative or trustee is not harmonious with the interests of an heir or beneficiary. *Trask*, 123 Wn.2d at 844. Because estate proceedings may be adverse, Washington courts disfavor finding "stray" duties to third party beneficiaries. *Id.* Specifically, the "[e]xistence of a duty to an adversary party beyond the courtesy and respect owed all participants in the legal process...would interfere with the undivided loyalty an attorney owes a client and would diminish an attorney's ability to achieve the most advantageous position for a client." (internal citation omitted). *Bowman v. John Doe*, 104 Wn.2d 181, 189, 704 P.2d 140 (1985). Indeed, in no instance has a Washington court found liability to a third party adversary. *Bowman*, 104 Wn.2d at 188-189. Furthermore, a recent Washington State Supreme Court case held "that an alignment of interests is insufficient to

support a duty of care to a non-client." *Stewart Title Guar. Co. v. Sterling Sav. Bank,* 178 Wn.2d 561, 569, 311 P.3d 1 (2013).

The conflict between Evelyn and later Doran (Gay's clients) and the non-client Linths is very apparent here. Gay knew and understood the wishes of his client, Evelyn. In this case, the arising of a conflict of interest is reflected in the fact Evelyn apparently did not agree with, or at least did not approve, any foundation plan(s) crafted by Jennifer Linth's sister, Claudia Smith, and thus Evelyn was not ready to provide a plan to Gay for attachment to the Amendment. Although Gay was not the person charged with creation of the foundation plan, and was not involved in Doran's (his client) decision to retain the services of Claudia and monitor her progress, he (as did Doran) understood that the post-death foundation "plan" proffered by Claudia was not in conformance with Evelyn's often-stated wishes. In fact, Evelyn had never intended for Green Point to become the Linth's private family retreat center. (CP at 266, 598). Neither Gay nor trustee Doran could agree that Claudia's proposed plan was in conformance with Evelyn's wishes and Gay (concurring with Doran) could not support it as that would have violated his duty of loyalty to his clients. *Id.*

The Linths are correct in stating that Gay had a duty. They are incorrect in asserting that the duty was owed to them. Courts should not

lightly abandon the long-established rule of privity between an attorney and client. Further, the attorney's duty of loyalty, established by law, tradition, and the Rules of Professional Conduct, must not be lightly abandoned.[1]

D. The Trial Court did not fail to consider the time period after the resignation and death of Evelyn Plant.

Following Evelyn's resignation as trustee and her later death, Gay owed a duty of loyalty to his client, Doran, throughout his representation. Gay's duty was to act in Doran's best interests, not the financial interests of any non-client beneficiary(ies). Contrary to the Linths' assertions, the trial court fully evaluated the time period after Evelyn's death as related to Gay's representation of Doran. In rendering his decision, Judge Harper said,

> In my view, **after Ms. Plant died**, there was a trustee, there was a personal representative of the estate. Mr. Gay was representing them. And under the Trask case, to me it's fairly clear -- and I don't see anything to the contrary -- to me it's fairly clear that Mr. Gay owed his duty to the trustee and the personal representative, and I think Trask is accurate. I mean, the -- if he was doing something wrong and giving bad advice and everything else to the trustee or the personal representative, the trustee or the personal representative could have discharged him, could ultimately sue him. The heirs, if they felt like something was going

[1] While Gay believes that other Trask factors are also in his favor, given the fact that Linth has resided at Green Point for the past 14 plus years and will ultimately receive a large sum of money upon its sale, Judge Harper did not make a ruling based on those factors.

> awry, they could have taken the matter to court and petitioned to remove the trustee and the guardian.
>
> ...
>
> But the point is, is the heirs of the estate, the heirs of the trust had other remedies, pretty obviously, after Plant died, and I don't -- and I think under the Trask case that Mr. Gay did not owe a duty to those beneficiaries.
>
> ...
>
> I would decide that as far as post-death, Mr. Gay owed no duty to the (Linths) when he was acting as attorney for the trustee and the personal representative.
>
> (RP 10/18/13 at p. 36, ll. 13-23, p. 37, l. 6-10, p. 38, ll. 7-10) (emphasis supplied).

The Linths concede that the Trustee has the active role in the administration of a trust and makes all final decisions for trust administration. It is well-established law in Washington that a beneficiary can maintain an action against a trustee for failure to properly administer a trust.

However, a trustee's attorney has a fiduciary duty to the trustee. The Linths' continual and critical focus on Gay's recommendation to Doran that all beneficiaries under the Trust and the Amendment be included in the litigation and settlement negotiations is misplaced, as it was Gay's ethical obligation to do so as the attorney for trustee Doran, not because he owed the beneficiaries any sort of duty. Once again, the Linths misstate the facts and the record below.

The Linths claim that their interests and Evelyn's interests are in complete alignment, and thus there is no issue regarding the duty of loyalty. And here is precisely the problem: the Linth's failure to appreciate that their interests *cannot* be neatly aligned with Evelyn's interests. It should be abundantly clear from the record before this court that the Linths were never the sole or even primary beneficiaries of any trust or testamentary provisions of Evelyn Plant. This misunderstanding is central to the issue of this appeal, and is precisely why Carl Gay did not and could not serve both the Linths and his other clients, Evelyn and later Doran. Of course, the logical extension of the Linths' argument potentially grants a cause of action to any beneficiary against the attorney who drafts a will or a trust. More to the point, this analysis of the Linths confuses the identity of the trustee and the beneficiary, both of whom, by logical necessity, must be separate entities. The attorney cannot represent both.

E. The Trial Court did not rule on negligence.

The Linths raise, for the first time, an argument that Judge Harper should have considered the alleged negligence of Gay. Leaving aside the untimeliness of this argument, Judge Harper never reached the issue of whether or not Gay was negligent, nor was such consideration necessary, because Gay did not owe the Linths any legal duty. As such, the Linths' accusations are irrelevant here because, as Judge Harper decided, Gay

does not owe the Linths a duty as non-client beneficiaries of a trust before or after Evelyn died. Under *Trask*, the threshold question is whether Gay owed a duty to the Linths. As a matter of law, Judge Harper ruled that he did not.

The case cited by the Linths, *Gordon v. Deer Park School Dist. No 414*, 71 Wn.2d 119, 426 P.2d 824 (1967), simply states that when a duty is defined by law and is the same under all circumstances, then the court can dismiss claims. Here, given the legal discussion above and the well-established Washington law related to legal malpractice and to whom a duty is owed, it is clear that it is a matter of law, not one to be determined by a jury. In any event, arguments not raised in the trial court should not be raised for the first time on appeal. RAP 2.5(a); *Link v. Link*, 165 Wn. App. 268, 279, 268 P.3d 963 (2011).

F. The Trial Court correctly granted Gay's motion for summary judgment against the Trust and the Foundation because the statute of limitation for legal malpractice had expired.

Washington law provides a three year statute of limitation for attorney malpractice claims. *Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.*, 129 Wn. App. 810, 816, 120 P.3d 605 (2005); RCWA 4.16.080. Washington policy favors an applicable statute of limitation shielding a defendant from stale claims. *Crisman v. Crisman*, 85 Wn.

App. 15, 19, 931 P.2d 163 (1997). Any rule which tolls the statute of limitations is in conflict with these policies. *Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 662, 37 P.3d 309 (2001).

Here, the trial court ruled that "the statute of limitations expired before this claim was made by the Trust and the Foundation and...on that basis the claim should be dismissed. I accept Gay's declaration that he no longer represented the trust after 2004." (RP 6/21/13 at p. 37, ll. 14-19). The Trust and the Foundation provided no evidence to the contrary to rebut Gay's declaration that he was not involved in trust matters after 2004, nor have the Linths done so on appeal, despite their bountiful number of exhibits. Instead, they rely on mere argumentative statements that Gay should have presented better evidence, including a declaration from Jennifer Linth's brother-in-law and subsequent trustee, Glen Smith. However, the Linths had ample opportunity in their trial court briefing to produce information from Glen Smith, or any other source with probative evidence, to rebut Gay's factual declaration. They failed to do so because Gay was not involved in trust matters after 2004, as he stated in his unrebutted declaration. As such, it is clear that the statute of limitations for the claims of the Trust and the Foundation expired at the end of 2007, two years before this claim was brought by the Linths and four years

before the Trust and Foundation filed their motion to intervene. The tolling agreement Gay signed with the Linths did not include any claims by the Trust or the Foundation.

In their opening brief, the Trust and the Foundation object to the consideration of Gay's June 14, 2013 declaration. (CP at 350). However, Gay relied on his knowledge of the facts at issue here and when he ceased his representation of Doran. Whether or not Gay's declaration contains legal arguments is irrelevant on appeal. His declaration contains factual assertions, including that he was no longer involved in trust matters after 2004, and the Linths have failed to provide any evidence to the contrary.

However, even if the trial court had relied on a later date for the three year statute of limitations to commence running, the latest date possible would be October of 2005, when the NDRA was signed by all parties and entered by the trial court. As part of the NDRA, Doran resigned as trustee. Therefore, no reasonable argument can be made that Gay was involved in any Trust or Foundation matters after October 2005. After Doran resigned as trustee in October of 2005, Glen Smith, Claudia's husband and Jennifer Linth's brother-in-law, became the successor trustee of the Trust. As such, he had access to all Trust documents, including the letter from Dean Butler to Doran citing a possible conflict of interest and negligence claim against Gay. However, Smith did not bring any action

against Gay or Doran in his three years as trustee. When Smith resigned as trustee in September of 2008, Jennifer Linth became trustee. Yet it was not until October 7, 2011 (more than three years later) before she moved to intervene in this action (which she started in her personal capacity in December of 2009) on behalf of the Trust and the Foundation. Regardless, any action by Jennifer Linth would have failed in 2009. As has been previously shown, the statute of limitations ran against the Trust and the Foundation in October of 2008, at the absolute latest.[2]

i. The Trial Court considered continuous representation in their analysis and correctly found that the statute of limitations ran against the intervenors.

The intervenors also claim that continuous representation applies, as discussed in the *Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson & Wyatt, P.C.* case. Again, that point is moot. Gay no longer represented the Trust nor, under the Linths' theory, could he have "started" the Foundation as he was no longer representing the trustee (who, under the Amendment, had the obligation to create the Foundation). Any claim the continuous representation rule has an effect on the outcome here must fail, as Gay was no longer involved in any trust matters beyond

[2] In the intervenors' opening brief, they suggest, without proof or support in the record, that neither Glen Smith nor Jennifer Linth had all trust documents during this time.

2004, or at the latest, 2005, when the NDRA was signed and Gay's client, Doran, resigned as trustee.

As Judge Harper correctly held, all the "principal players involved knew or had reason to know that there were possible claims." (6/21/13 at p. 37, ll. 21-23). It was clear that the Linths had notice of a potential claim in 2003 when Jennifer Linth's attorney wrote a letter to Gay and indicated there was a possible action for malpractice and even included a draft complaint. (CP at 357, Ex. 1). In fact, the complaint which was filed by the Trust and the Foundation in 2012 was drafted in 2003 by one of the Linth's attorneys, Romney Brain, minus party identification and one contract claim which was added. (CP at 357 Ex. 1, 505). Indeed, the complaint against Gay filed by the Linths in 2009 is the identical complaint which Romney Brain drafted in 2003. (CP at 913).

Regardless, the Trust, by way of then trustee Dan Doran, had notice of a potential malpractice claim in 2001 when it received the letter from Dean Butler. (CP at 139). Curiously, the intervenors argue that there is no evidence that Doran actually read this letter from Mr. Butler, despite the fact it was addressed to him. To the contrary, everything in the record points to the fact that Doran was well aware of the facts underlying the intervenors claim, as Judge Harper found in his opinion. Multiple

attorneys were involved, including former superior court judge Brooke Taylor, who had taken over representation of Doran in 2004.[3]

Trustees have the power to act for a trust with respect to certain duties as established by law. RCW 11.98.070; *Kincaid v. Hensel*, 185 Wash. 503, 505, 55 P.2d 1050 (1936). Once the trustee resigns, as Doran did in October of 2005 and later Glen Smith in 2008, the powers of the trustee flow to a successor trustee, in this case, respectively, Smith and Jennifer Linth. RCW 11.98.060. Specifically, the power to bring a lawsuit "to protect trust property and the trustee in the performance of the trustee's duties" is passed down to successor trustees. RCW 11.98.070 (37). As such, once a trustee has knowledge of facts which would give rise to a cause of action, as Glen Smith and Jennifer Linth clearly had, the statute of limitations commences to run. *Richardson v. Denend*, 59 Wn. App. 92, 795 P.2d 1192 (1990); *Gevaart v. Metco Constr., Inc.*, 111 Wn.2d 499, 760 P.2d 348 (1988). It is not dependent on any one individual trustee, but rather the position of trustee.

The intervenors cannot produce any evidence which supports their position they did not know the underlying facts of their claims against

[3] Doran's counsel (Brooke Taylor's former law firm) joined in Gay's motion for summary judgment, stating that Doran endorsed the argument that the statute of limitations ran against the intervenors. (CP at 457). Additionally, Doran's counsel filed a motion in support of Gay a second time after the intervenors filed a motion for reconsideration. (CP at 292).

Doran and Gay as of at least October of 2005. The statute has expired against the Trust and the Foundation. Any assertion that either the Trust or the Foundation only *recently* discovered the alleged negligence of Doran or Gay, or that such knowledge was *wrongfully* withheld, is unsupportable, lacks credibility, and must be rejected. As the trial court correctly noted, Jennifer Linth is the key common denominator to all three parties, including the Trust and the Foundation. She has been involved directly in the estate matters of Evelyn Plant since 2001 when she retained counsel as a beneficiary of Evelyn's estate. It is important to note that this action was commenced by Jennifer Linth in her individual capacity in December of 2009. Furthermore, the Trust and the Foundation did not move to intervene in this action until October of 2011. However, both the Trust and the Foundation had notice well before this action was commenced; in fact, it is not even close.

ii. The trial court applied the proper analysis to Gay's motion under *Columbia Gorge* and correctly found that intervention does not bar subsequent motions.

Motions to intervene and motions for summary judgment are two different motions and subject to two different rules and differing standards. *See* CR 24 and CR 56. However, once intervenors are allowed intervention under CR 24, as they were here, they are treated as an original

party to an action. *Dumas v. Gagner*, 137 Wn. 2d 268, 971 P.2d 17 (1999). The grant of intervention does not relieve a party of the standards that all parties must meet. *Id.* Instead, once an intervenor joins a lawsuit, they are still subject to summary judgment motions for failing to meet their respective burden. *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 92 P.3d 243 (2004) (where the court applied the summary judgment standard for and against intervenors' claims and granted summary judgment against the intervenors); *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 71 P.3d 644 (2003) (where citizens intervened in a lawsuit regarding the constitutionality of an initiative and the court granted summary judgment in favor of the defendant State and the Supreme Court affirmed). In fact, as stated above, the motion to intervene analysis only looks at limited aspects of the potential claim(s) to determine if the party seeking intervention *may* have a claim and can be allowed to intervene in an on-going action. D*oyle v. Planned Parenthood of Seattle-King County, Inc.*, 31 Wn. App. 126, 131, 639 P.2d 240 (1982). Motions to intervene do not evaluate the burdens which parties bear in a lawsuit, but merely whether they have an interest in the litigation.

When the intervenors postulate that CR 24 is controlling, they only cited to cases where the court was analyzing *"intervention timeliness,"* not

a summary judgment analysis. *See Columbia Gorge Audubon Soc'y v. Klickitat Cnty.*, 98 Wn. App. 618, 989 P.2d 1260 (1999). The court in *Columbia Gorge* was analyzing a motion to intervene in an administrative action and thus subject to the rules of the Administrative Procedure Act, including a ten day statute of limitation for an appeal. *Id.* at 623. There, the Yakama Nation, who failed to properly appeal the Board's decision in ten days, attempted to intervene in an appeal which was timely filed by the Columbia Gorge Audubon Society. *Id.* at 620. The *Columbia Gorge* case merely holds that when a defendant received the full protection of the statute of limitation, the intervention of a party plaintiff who is not seeking damages will not be automatically barred because the statute of limitations has run against them. *See Id.* generally. This is clearly not the case here.

Here, the Trust and the Foundation filed their motion to intervene and Judge Olson believed that they met their low burden to be allowed into the lawsuit, as indicated above. (CP at 585). However, once their motion to intervene is granted, they are treated the same as original parties. In fact, Judge Olson stated in her ruling that "[a]t this stage in the proceedings, however, the Court cannot determine that the statute of limitations has run" and further cited that the Court's evaluation was based on the "futility" of the claims, not whether or not the statute of limitations had run or not. (*Id.*). Thus, the Court clearly evaluated the intervenors'

motion under CR 24, not CR 56. Indeed, the Linths' also conceded in their January 27, 2012 Rebuttal of Proposed Intervenors, at page 13, line 19: *"furthermore, the issue of the application of the statute of limitations can be litigated after the intervention is allowed"*. (CP at 535)

Thus, after intervention, Gay filed summary judgment motions as to the Trust and the Foundation, with additional evidence based on the running of the statute of limitations, in part, as instructed to do so by Judge Olson in her February 2, 2012 order. (CP at 585). After considering Gay's motions and the record before it, the trial court correctly applied the CR 56 summary judgment standard for the expiration of the statute of limitations under Washington law.

Furthermore, the record here reflects that the originating claim is only timely due to a *tolling agreement* between the defendants and (only) the Linths, in their individual capacity. (CP at 637, Ex. E). Without such a tolling agreement, the Linths' claims would also be subject to the statute of limitations. The Trust and the Foundation were not parties to that tolling agreement, and thus their claims were not tolled and are subject to the three year statute of limitations.

While the intervenors claim that Gay was aware of their claims and thus they bear no burden to comply with the statute of limitations; that is untrue. As discussed above, trustees Doran and Smith had ten years to

bring a lawsuit against Gay. Neither trustee did. Gay had no reason to suspect the Trust or the Foundation would attempt to bring suit well after the statute of limitations ran. Furthermore, the tolling agreement was a contract between the Linths, in their individual capacity, and Gay. No consideration was provided to toll the statute for the Trust or the Foundation, and to hold that they were parties to that agreement is contrary to well-established basic contract law. Additionally, the Linths had no power to enter into that agreement on behalf of the Trust or the Foundation, as Jennifer Linth was not yet a successor trustee nor had she formed the Foundation at that time. As such, it is clear that the Trust's and the Foundation's possible claims were not tolled with respect to any action against Gay.

The trial court correctly analyzed *Colombia Gorge* and its holding when ruling that the statute of limitations argument had not been decided previously and was ripe for dismissal. (CP at 290). After intervention, parties may file motions for summary judgment, and have done so repeatedly. Interestingly, the intervenors cite no case law to support their claim. They merely rely on their incorrect, and puzzling, interpretation of the *Columbia Gorge* case.

iii. The Foundation could have been formed at any time regardless of the actions of Gay and could have attempted to assert its legal rights.

The formation of a "foundation" is not controlled by one person. Instead, any individual can file paperwork with the Secretary of State and form a "foundation" as a corporation, much as Jennifer Linth did in February of 2011 when she formed "The Franklin and Evelyn Plant Green Point Foundation." (CP at 591, Ex. G). Indeed, not only did Jennifer Linth become the trustee of the Trust in 2009, she is also the registered agent of the Foundation and a Director, as are her brothers John and David Linth. *Id.*

As discussed in detail above, Gay was no longer involved in any trust matter as of 2004 and Doran, Gay's client, was no longer trustee as of October of 2005. As such, no one prevented the Foundation from forming from the end of 2004 until February 2011, except Smith and Jennifer Linth. Even before 2005, Gay never "thwarted" any attempt to start the Foundation; anyone could have formed it, including Jennifer Linth, Doran, or Glen Smith (as was actually their obligation under the Amendment). Gay did not control Doran's actions, he only provided him with legal advice when and if called upon, which he was free to follow or not. Jennifer Linth was free to set out and establish it herself with the assistance of her multiple attorneys. Jennifer Linth clearly had knowledge of the underlying facts at issue, as correctly found by Judge Harper. (6/21/13 at p. 37, ll. 21-23). Glen Smith, with independent counsel, as

trustee from 2005 until 2008, also could have started the Foundation; he did not through no fault of Gay.

What an individual cannot do, as the intervenors failed to support in their briefing, is start a foundation ten years after the alleged negligence and decide to bring an action against an attorney for malpractice. Given Jennifer Linth's involvement in the trust litigation as well as the Foundation, it cannot be said that the Foundation lacked knowledge of the events at issue. Instead, the Foundation had direct knowledge through its Agent and Directors (Jennifer Linth, two of her brothers, John and David, Claudia and Glen Smith among others with knowledge) yet failed to timely bring an action against Gay. To hold that a corporation can be formed well past the statute of limitations and maintain a claim for negligence when the Directors have direct knowledge of the claims for well beyond the statutorily allowed period contravenes Washington law. As such, the trial court was correct in granting summary judgment against the Foundation.

VI. CONCLUSION

Judge Harper got it right: for the reasons set forth above, Gay did not, and could not, owe the Linths a legal duty in this matter. Further, the statute of limitations clearly ran against the intervenors, *years* before they

instituted suit. Given the foregoing arguments and the record before the Court, it is clear that the trial court's decisions on summary judgment were proper and consistent with Washington law and should be affirmed.

Respectfully submitted this 23 day of September, 2014.

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CERTIFICATE OF SERVICE

I, Kimberly Blackwood, hereby certify under penalty of perjury under the laws of the State of Washington that I am over the age of eighteen, not a party to this lawsuit, am an employee with the law firm of Johnson, Graffe, Keay, Moniz & Wick, LLP, and that on the 23rd, day of September, 2014 that I served a true and correct copy of the Brief of Respondent Gay, on counsel or parties of records as noted in the service list below.

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