101219-5

NO. 83416-9

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

NGUYEN FAMILY TRUST,

Appellant,

v.

DARLENE PIPER and AMERICAN LEBANESE SYRIAN ASSOCIATED CHARITIES, INC., d/b/a ST. JUDE CHILDREN'S RESEARCH HOSPITAL

Respondent.

APPELLANT NGUYEN FAMILY TRUST'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner is the Nguyen Family Trust ("NFT"), the Plaintiff in the underlying action and the Appellant herein.

II. CITATION TO COURT OF APPEALS DECISION

NFT requests review of the decisions of the Court of Appeals, Division I ("Division I") in Nguyen Family Trust v. Darlene Piper ("Piper") and American Lebanese Syrian Associated Charities, Inc, d/b/a St. Jude Children's Research Hospital ("St. Jude").

III. INTRODUCTION

This case involves a clear matter of right and wrong. St. Jude has possession NFT's stolen money and refuses to return it.

Defendant Piper WSBA #24244 is a former attorney who is now serving time in a federal prison for her fraudulent scheme in stealing money from NFT, a self-settled trust for the benefit of

Tina Chapman ("Chapman"). Piper stole NFT's money and gave it to St. Jude to hide the fact that Piper, while acting as personal representative of the Estate of Jack Yates (the "Yates Estate"), had misappropriated funds from that estate that were intended for St. Jude. In other words, rather than own up to the fact she had wrongly taken estate money meant for St. Jude and used those funds for her own benefit, Piper stole $500,000 from NFT under the guise of assisting NFT with an investment in bonds and gave it to St. Jude in an attempt to hide her misdeeds with the money from the Yates Estate.

Chapman/NFT sued Piper seeking to find out where her money was and recoup that stolen money. Once it was learned during the pendency of the lawsuit that Piper paid NFT's $500,000 to St. Jude, St. Jude was joined as a defendant. NFT obtained a civil judgment against Piper for fraud and conversion of NFT's money. However, despite the theft, both the trial court and the Division I allowed St. Jude to retain NFT's stolen money. They did so under the technical theory that a civil judgment

against Piper for her conversion is an "adequate remedy at law," supposedly eliminating any equitable claim or remedy against St. Jude for restitution, unjust enrichment or a constructive trust, which would have compelled a return of the stolen funds back to NFT as the rightful owner.

Division I's opinion, allowing St. Jude to retain stolen money, is directly contrary to Washington Supreme Court precedent that has been repeatedly reaffirmed since the decision in *Rozell v. VanDyke*, 11 Wash. 79, 39 P. 270 (1895), recognizing the right of a party who was divested of property through fraud or misrepresentation to recover that property by means of a constructive trust, even if the property had been transferred to a subsequent holder, such as St. Jude.

The decision also conflicts directly with other Court of Appeals decisions, such as *Bailie Communications, Ltd. v. Trend Business Systems*, 53 Wn. App. 77, 765 P.2d 339 (1988), where the trial court was directed to enter a judgment for unjust enrichment against a third party who received fraudulently

obtained funds, even though the plaintiffs already prevailed on legal claims against other defendants involving liability for the same funds.

Under the reasoning adopted in Division I's Opinion in this case, a victim in NFT's shoes could never obtain restitution as a remedy against someone other than the thief, even if the stolen property is traceable to another person, because a victim will always be entitled to a money judgment against the thief, a truly pyrrhic victory.

The Court's error below, allowing a person to retain stolen money despite the fact that conversion has been proven against the thief, also raises an issue of substantial public interest. In fact, it is so important to return stolen money that our legislature has made it a Class B felony to knowingly retain stolen property in excess of $5,000.00. RCW 9A.56.140 and .150. St. Jude should not have been permitted to retain NFT's stolen money, as it is a crime to do so.

Equity demands that St. Jude return the stolen money, and therefore, this Court should accept review and correct the holding below.

IV. ISSUES PRESENTED FOR REVIEW

1. Whether the Court should accept review when Division I's opinion conflicts with Washington Supreme Court precedent that has been repeatedly reaffirmed since its decision in *Rozell v. VanDyke*, 11 Wash. 79, 39 P. 270 (1895), recognizing the right of a party who was divested of property through fraud or misrepresentation to recover that property by means of a constructive trust, even if the property has been transferred from the original wrongdoer to a subsequent holder?

2. Whether the Court should accept review when Division I's opinion denying the NFT's claims for restitution and unjust enrichment to recover money lost through fraud conflicts with the published Court of Appeals decision in *Bailie Communications, Ltd. v. Trend Business Systems*, 53 Wn. App. 77, 765 P.2d 339 (1988), where the Court of Appeals applied

the Restatement (First) of Restitution §123, and directed the trial court to enter judgment for unjust enrichment against a third party who received fraudulently obtained funds, even though the plaintiffs had already prevailed on legal claims against two other defendants involving liability for the same funds?

3. Whether the Court should accept review when Division I's opinion involves an issue of substantial public interest, where the decision condones and legitimizes a third party's receipt and retention of money obtained through fraud and conversion simply because the rightful owner has obtained (or has the ability to obtain) a money judgment against the thief/ fraudster, which runs contrary to both legislative and judicial protections of property rights?

V. STATEMENT OF THE CASE

1. FACTUAL HISTORY

Chapman, a Vietnamese immigrant and the settlor and

beneficiary of the NFT[1], is attempting to recoup trust money that her former attorney, Piper, stole.

A. Piper misappropriated estate funds meant for St. Jude.

In 2014, former attorney Piper withdrew $520,000 out of the total of approximately $525,000 held by Yates Estate, which estate Piper was administering as its personal representative.[2] St. Jude was intended to be the sole beneficiary of the Yates Estate.[3] Following a series of transactions in and out of various bank accounts,[4] which included a forged endorsement by Piper, Piper transferred $200,000 of the $520,000 in Yates Estate's money from her Columbia Bank account to Paraguay for investment in high interest bonds (15%-17%) in Piper's own name.[5] Between June and August 2014, Piper transferred the remainder of the Yates Estate's funds of over $300,000 from her Columbia Bank

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[1] RP. Vol. 2, p. 74; 159
[2] RP V.3, p. 118; CP 881-886.
[3] CP 881-886.
[4] RP V.3, p 120, 133, 137; CP 778, 845, 900, 906, 993
[5]CP 873-877; RP V.3. p 139-140

account to her IOLTA trust account in a series of checks, out of her paranoia that banks might report too many big checks being written.[6]

Then, in August 2014, Piper transferred the balance of Yates Estate's funds of over $300,000, together with other monies for a total of $800,000, from her IOLTA trust account to Paraguay,[7] in order to make a two-year, high-interest loan promising an interest rate of 20%.[8] The loan was made solely in Piper's name to Mr. Ever Marengo, a Paraguayan arms dealer.[9]

Marengo made monthly interest-only payments on the loan from October 2014 to July 2015 when he defaulted.[10] As a result of the default, Piper would be unable to return the Yates Estate's funds.

B. Piper stole Chapman's money from NFT to cover her wrongdoing.

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[6] RP V.4, p. 138-142.
[7] CP 1014; RP V.1, p. 21-23.
[8] CP 824-826, 1108-1136
[9] Id.; An Order in Limine prevented NFT from referring to Mr. Marengo as an arms dealer or a gun dealer. CP 541.
[10] RP V.4, p. 96.

Chapman had worked six to seven days a week running a restaurant.[11] She sold the restaurant business and worked to build a house on Bainbridge Island.[12] She then sold the house on Bainbridge Island to purchase a gas station in Gig Harbor.[13] The restaurant, the house, and finally the gas station represented Tina Chapman's "retirement" fund,[14] which was the product of her hard work and long hours for most of her adult life. Piper had acted as Chapman's lawyer and the two were also friends.[15] Piper attended the closing of the sale of Chapman's home.[16]

Desperate to close the Yates Estate without disclosing her misappropriation of estate funds, Piper told Chapman she could earn 15% return by investing in Paraguayan bank bonds, which Piper represented were government backed and, therefore, safe.[17]

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[11] RP Vol. 2, pp. 84, 86.
[12] RP Vol. 2, pp. 105, 119, 146.
[13] RP Vol. 2, pp. 82, 90-91
[14] RP Vol. 2, p. 136
[15] RP Vol. 2, p. 88-89
[16] RP Vol. 2, p. 92
[17] RP Vol 2, p. 111, 144

She did not inform Chapman that she intended to transfer the funds to St. Jude to cover her wrongdoing.

The proceeds from the sale of Chapman's house were deposited in the NFT's bank account on August 31, 2015.[18] Nine days later, on September 9, 2015, through Piper's fraud, $515,000[19] was deposited into Piper's IOLTA trust account.[20] Prior to the September 9, 2015, deposit of $515,000, Piper's IOLTA trust account only had a balance of $866.76.[21] Following receipt of Chapman's money, Piper texted Chapman, claiming: "I will stop by the bank tomorrow to set up the wire to Paraguay. You'll start getting your interest next month."[22] Unfortunately, Piper had no intention of investing Chapman's money in government backed bank bonds, as she had falsely represented.

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[18] RP Vol. IV, p. 29; CP 1137-1139 (EX 475)
[19] RP V.2., p. 82. $15,000 of the $515,000 was repayment amounts owed to Piper for the purchase of restaurant equipment. The balance of $500,000 was to be invested by Piper into bond funds.
[20] CP 1035; CP 831-832.
[21] CP 1044-1049 (EX. 77)
[22] CP 1070-1072.

Instead, she needed Chapman's money to replace the funds she had previously lost as a result of her imprudent loan to the Paraguayan arms dealer.

On October 1, 2015, Piper converted[23] $500,000.00 of NFT's money and paid it to St. Jude in a $528,730.61 cashier's check drawn on her IOLTA trust account.[24] Piper then filed a sworn but false estate accounting with the Kitsap County Superior Court, that omits (i) her withdrawal of $520,000 in estate funds, (ii) her investment of $200,000 in Paraguayan bonds, (iii) her investment of the $320,000 balance in the Marengo loan, (iv) her receipt of over $92,000 in interest earned on the Marengo loan.[25]

NFT's money is, therefore, directly traceable to St. Jude. To cover her fraud and conversion, two days later, on October 3, 2015, Piper sent Chapman another text message falsely stating

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[23] CP 627-629 (Verdict Form)
[24] CP 947-950 (EX. 49). CP 1044-1049 (EX. 77)
[25] CP 887-897 (EX 33)

(i) her money had been wired to Paraguay, (ii) it had been converted to the local currency, (iii) Piper would fly to Paraguay the following week to set up the investments, and (iv) Chapman could withdraw her investments at any time.[26] In December 2015, Piper then gave Chapman a check for $12,500 as "interest" for the supposed investment in the bank bonds.[27]

When it was subsequently discovered during the course of the present lawsuit that Piper had actually sent NFT's $500,000.00 to St. Jude instead of investing those funds in bonds as she had represented, St. Jude was added as a defendant to recoup the stolen funds it had received.

In reading the Court of Appeals opinion, one would think that Piper had invested NFT's money. See, e.g. Opinion at page 2: "Piper later admitted that she ultimately directed the money into a mortgage-backed loan despite Chapman not fully

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[26] CP 1104-1107

[27] CP 1032-1034; RP V. 2, p. 131. But there was no investment in bonds or otherwise. And the Marengo loan had gone into default five months earlier.

understanding the investment." But this "admission" was nothing more than Piper's after-the-fact concoction[28] to argue to the jury that she did not steal Chapman's funds and instead the funds were lost as a result of a failed investment. She claimed Chapman was intending to replace St. Jude's as the primary investor in the Marengo loan. This was a lie, and in fact, the Marengo loan was already in default. This claim by Piper and St. Jude was soundly rejected by the Jury's verdict in favor of NFT finding Piper committed fraud, conversion and a violation of Washington's Securities Act.[29] The jury specifically found that NFT's $500,000 was converted – i.e., stolen – by Piper.[30] Indeed, after the trial and judgment against her, Piper ultimately confessed to her theft.

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[28] In Piper's initial bankruptcy filings that she prepared under the penalty of perjury with the assistance of counsel, Piper asserted that the entirety of the Paraguayan mortgage-backed loan was her own, that she, herself had earned over $92,000 in interest on that loan, and that she herself had provided a gift to St. Jude in the amount of $529,000. CP 803-818 (EX 3). Piper later changed her story as she attempted to dodge liability in the present lawsuit.

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

[30] *Id.*

Yet on appeal at Division I, St. Jude continued to argue the same untruth that it asserted at trial under its joint defense agreement with Piper, and the same untruth that it repeated fifteen (15) times in its Respondent's Brief—that Piper had allegedly invested NFT's money in the Paraguayan loan. But that claim was rejected by the jury's finding of conversion and regardless cannot be accepted as true on summary judgment.

During the pendency of this appeal, NFT asked the Court to take judicial notice of Piper's guilty plea wherein she confirmed that NFT's money was never invested at all but instead was sent to St. Jude.[31] That motion was never ruled upon until well after Division I issued its opinion.[32] Piper's August 30, 2021, guilty plea in *United States v. Piper*, CR20-5372JRB which arises from her scheme to defraud and convert NFT's $500,000.00, conclusively establishes that no investment of any

[31] See Appendix 3 ("TC" refers to Tina Chapman, the sole beneficiary of NFT)
[32] See Appendix 4 & 5

kind was ever made, and instead NFT's money was stolen and paid to St. Jude.[33] St Jude cannot dispute it is in possession of NFT's money, which was stolen by Piper under false pretenses.[34]

2. PROCEDURAL HISTORY

The present case comes before the Court on the review of an order granting summary judgment, dismissing NFT's bifurcated claims against St. Jude for restitution, unjust enrichment and imposition of a constructive trust following the jury's verdict against Piper. The jury found Piper violated Washington's Securities Act[35], committed fraud, and converted NFT's $500,000.00. St. Jude moved for summary judgment arguing

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[34] RPC 3.3 Candor to the Tribunal.

[35]The Securities Act is violated when a party contracts for the purchase of securities, but no securities are delivered. *See e.g.* M*cClellan v. Sundholm*, 89 Wn.2d 527, 533, 574 P.2d 371 (1978)(A seller's agreement to sell silver bullion to a buyer for investment purposes, acceptance of the buyer's money, followed by the seller's failure to provide any bullion was a contract of sale in violation of the Securities Act.).

that (i) NFT's $500,000 became Piper's because a "sale" of a security occurred, making the $500,000 the rightful property of Piper to do with as she wished, and (ii) that equitable claims against St. Jude were foreclosed by the judgment against Piper which it claimed was an "adequate remedy at law." In light of the jury's uncontested finding that Piper converted its funds, NFT, as the nonmoving party, moved for entry of judgment against St. Jude for restitution.[36] However, the trial court granted summary judgment and dismissed NFT's claims for a return of its money.

Division l's opinion affirmed the trial court's dismissal of NFT's claims against St. Jude, finding that NFT's claims against St. Jude for restitution, unjust enrichment, and a request for a constructive trust, were just a single claim for unjust enrichment "[37] Division I found that NFT's judgment against

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[36] CP 718-739.

[37]Opinion at page 5. *Cf. Nelson v. Appleway Chevrolet, Inc.*, 160 Wn. 2d 173, 187–88, 157 P.3d 847 (2007) "restitution. . . is 'itself a source of obligations…'"

Piper was an adequate remedy at law, barring any equitable claim against St. Jude. [38] Division I called NFT's claim that Piper would not pay the judgment "speculation."[39]

On July 29, 2022, Division I issued an order denying NFT's Motion for Reconsideration. *See* Appendix 2.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Long standing Washington Supreme Court precedent allows persons whose property has been lost through fraud to recover that property in the hands of a subsequent transferee by means of the imposition of a constructive trust.

Since 1895, the Washington State Supreme Court has recognized the right of a party whose property has been lost

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[38] Id. at p. 10.

[39] Id. at p. 7. It is clear that Piper will never pay NFT's judgment against her. After this lawsuit was commenced in July 2017, Piper filed bankruptcy on August 30, 2017. On September 22, 2017, with the assistance of counsel, Piper filed a schedule of her assets. She did not own a car or a house. The combined value of her personal property and her financial assets totaled $986. CP 803-818 (EX. 3- Bankruptcy schedules)

through fraud or misrepresentation to trace their property and recover their property by means of a constructive trust, even if the property has been transferred from the original wrongdoer to a subsequent holder. *See Rozell v. VanDyke*, 11 Wash. 79, 39 P. 270 (1895).

A constructive trust arises where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. *Baker v. Leonard,* 120 Wn. 2d 538, 548, 843 P.2d 1050 (1993) *(citing Proctor v. Forsythe*, 4 Wn. App. 238, 242, 480 P.2d 511 (1971) and *Thor v. McDearmid*, 63 Wn. App. 193, 206, 817 P.2d 1380 (1991)).

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

> We adopted the following rule from 4 Pomeroy, Equity Jurisprudence § 1053 as early as 1895 in

> *Rozell v. Vansyckle*, 11 Wash. 79, 39 P. 270, and reiterated it as recently as 1961 in *Bangasser & Assoc., Inc. v. Hedges*, 58 Wn.2d 514, 516, 364 P.2d 237, 239:
>
> "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress. . . equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same; * * * **and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right** * * *."
>
> This court has often held that a constructive trust was a proper remedy upon factual situations which constituted something less than actionable fraud. See, *In re Yiatchos' Estate*, 60 Wn.2d 179, 373 P.2d 125 (1962); *Watkins v. Gorlick*, 52 Wn.2d 95, 323 P.2d 649 (1958); *Kausky v. Kosten*, 27 Wn.2d 721, 179 P.2d 950 (1947); *Dexter Horton Building Co. v. King County, 10* Wn.2d 186, 116 P.2d 507 (1941); and *Seventh Elect Church in Israel v. First Seattle Dexter Horton National Bank*, 162 Wash. 437, 299 P. 359 (1939).

Viewcrest, 70 Wn.2d at 293 (emphasis added).

Thus, the rule first announced in *Rozell* allows the true owner of property that has been lost through the fraudulent

conduct of another to trace and recover their property, even if it has been transferred to a subsequent holder, by means of a constructive trust.

Implicit in this jurisprudence that allows a rightful owner to recover property via a constructive trust imposed upon a subsequent holder who is removed from the original fraudster, is the principle that the wronged party is not limited to only an action against the fraudster as an "adequate remedy at law." Limiting a defrauded party's rights to a legal action and judgment against a fraudster, that Division I opines is an "adequate remedy at law." eviscerates long standing case law allowing the rightful owner to trace and recover its property through a constructive trust, even if that property is transferred to a remote holder.

It is beyond dispute that $500,000 deposited in Piper's IOLTA trust account on September 9, 2015, was NFT's property that was then converted by Piper, as the jury found. St. Jude received NFT's $500,000 by cashier's check on

October 1, 2015, as a result of Piper's fraud and conversion. St. Jude paid nothing for that wrongful gift/receipt of NFT's money. Long standing case law allows for the imposition of a constructive trust against NFT's money in St. Jude's possession. This Court should accept review of the Court of Appeal's decision.

2. Division I's opinion conflicts with the reported case of *Bailie Communications, Ltd. v. Trend Business Systems*, 53 Wn. App. 77, 765 P.2d 339 (1988), where the Court found that a trial court erred when it declined to enter a judgment for unjust enrichment against a defendant who received funds as a result of fraud by others even though the plaintiffs had already prevailed in their legal claims against the two defendants that defrauded them.

In the case at bar, Division I ruled that NFT's equitable claims for restitution and unjust enrichment against St. Jude for the return of its $500,000 that Piper obtained through fraud and conversion and then paid to St. Jude were properly dismissed because NFT obtained a judgment at law against Piper, which foreclosed any further equitable remedies. However, that ruling is directly contrary to the ruling in *Bailie Communications, Ltd.*

v. Trend Business Systems, 53 Wn. App. 77, 765 P.2d 339 (1988) where an equitable remedy was mandated even after the plaintiffs prevailed on their legal claims.

In *Bailie,* the Bailies were defrauded out of $175,000 in loan proceeds by Suburban Investment Corporation ("Suburban") and Harold T. Wosepka. *Bailie,* 53 Wn. App. at 78-79. ("Wosepka"). Wosepka, who was the president of Trend Colleges, Inc., infused all of the loan proceeds into Trend Colleges. *Id.* at 79.

The Bailies sued Suburban and Wosepka, as well as Trend Colleges. At trial, the Bailies prevailed against defendants Suburban and Wosepka on legal claims. However, the trial court dismissed the Bailies' claim against Trend Colleges, the recipient of the loan proceeds. *Id.* at 79.

On appeal, the Court of Appeals reversed the trial court's dismissal of Trend Colleges and directed that the trial court enter a judgment against Trend Colleges for unjust enrichment.

The Court began its analysis with a statement that "[e]ven third parties who innocently acquire property must sometimes surrender it if the property was fraudulently obtained," *Id.* at 85 (citing the Restatement of Restitution § 123 (1937)) The Court in *Bailie* further noted that a person's receipt and retention of monies obtained by the fraud of a third person results in unjust enrichment when the recipient did not pay value for any of the funds it received, again citing the Restatement of Restitution § 123. *Id.*

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

> First, Trend received and retained the proceeds of fraud knowing of the Bailies' rights. Trend knew of the fraud through Wosepka because Wosepka was Trend's president and sole shareholder. See 3 W. Fletcher, Private Corporations §§ 796, 799 (rev. ed. 1986). **Second, Trend did not pay value for any of the mortgage proceeds. Either of these**

> **reasons[40] makes Trend's otherwise lawful acquisition and retention of the proceeds unjust.** See Restatement of Restitution § 123.

Id. at 85 (emphasis added).

Consequently, despite the fact that the Bailies had prevailed on their actions at law against Suburban and Wosepka, the Court of Appeals held that the trial court erred in dismissing Trend Colleges, and ordered that a judgment on an equitable claim for unjust enrichment in the amount of $175,000 should be entered against Trend Colleges based on its receipt of the fraudulently obtained loan proceeds. *Id.*

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

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

§123 BONA FIDE TRANSFEREE WHO IS NOT A PURCHASER FOR VALUE.

A person who, non-tortiously and without notice that another has the beneficial ownership of it, acquires property which it would have been wrongful for him to acquire with notice of the facts and of which he is not a purchaser for value is, upon discovery of the facts, under a duty to account to the other for the direct product of the subject matter and the value of the use to him, if any, and in addition, to:

a) return the subject matter in specie, if he has it;

b) pay its value to him, if he has non-tortiously consumed it in beneficial use;

c) pay its value or what he received therefor at his election, if he has disposed of it.

Comment:

a. The rule stated in the Section is applicable to a person who, by gratuitous grant, by will or by descent, has received the title to property, either real or personal, in which another has beneficial ownership of which the transferee has no notice at the time of the receipt . . .

The Restatement (First) of Restitution § 123 (1937) (emphasis added).[41]

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[41] *Compare* the more recent Section 41 of the Restatement (Third) of Restitution and Unjust Enrichment (2011) which states: "A person who obtains a benefit by misappropriation of financial assets, or in consequence of their misappropriation by another, is accountable to the victim of the wrong."

Comment (a) directly applies to St. Jude which gratuitously received NFT's money as a purported bequest from the Yates Estate under a will.

Under the holding of *Bailie*, a judgment for unjust enrichment should be entered against St. Jude as the recipient of NFT's $500,000 that it obtained through Piper's fraud and conversion even though NFT prevailed in its legal claims against Piper. The fact that St. Jude, like Trend Colleges, paid no value for the funds it received, makes St. Jude's retention of NFT's funds unjust.

3. The Court should accept review as a matter of substantial public interest as Division I's opinion contradicts both judicial decisions and legislative edicts establishing a strong public policy requiring the return of fraudulently obtained, stolen and/or converted property to the rightful owner.

From its inception, Washington State has historically been protective of the rights of property owners who have been deprived of their property by wrongdoing. Since at least 1873,

it has continuously been the law in Washington that "all property obtained by larceny, robbery or burglary, shall be restored to the owner; and no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his or her rights to such property…." RCW 10.79.050.

The Legislature further sought to protect the rights of property owners against third parties who may come into possession of wrongfully obtained property by the enactment of RCW 9A.56.140(1) which makes possessing stolen property a crime[42] if a person retains or possesses stolen property knowing that it has been stolen.[43] The fact that the person who stole the property has not been convicted is not a defense to a charge of possessing stolen property. RCW 9A.56.140(2).

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[42] RCW9A.56.150 makes it a class B felony if the property is valued at over $5,000.

[43] Conversion is the civil equivalent of criminal theft. *State v. Hollinrake*, 608 N.W.2d 806, 808 (Iowa Ct. App. 2000).

Not only has the legislature been protective of property rights of owners who have been divested of property through wrongdoing, since the 1895 decision in *Rozell v. VanDyke*, *supra,* Washington courts have allowed a party who has been divested of property through fraud to recover that property by means of a constructive trust, even if the property has been transferred from the original wrongdoer to a subsequent holder.

Thus, both the legislative and judicial protections of the rights of property owners vis-à-vis third parties who may come into possession of property though the misdeeds of others are matters of substantial public interest that are in jeopardy with Division I's opinion which curtails the rights of the true owner to recover their property through any claim in equity.

VII. CONCLUSION

Division I's opinion is unjust as it condones a third party's receipt and retention of money obtained through fraud and conversion. Division I's analysis that a property owner's

equitable remedy to recover property from a third party recipient, where the property was divested from the owner by fraud and conversion from a third party, is absolutely barred by a legal remedy against the fraudster flies in the face of this Court's well established precedent allowing a party to recover such property by means of a constructive trust against the recipient of property. Moreover, Division I's opinion conflicts with its reported decision in *Bailie v. Trend Colleges* et al. wherein Division I directed the trial court to enter judgment for unjust enrichment against a defendant who obtained money through the fraud of two co-defendants, despite the fact that the plaintiff had obtained judgments against the co-defendants on legal claims.

This Court should accept review, reverse the trial court's summary judgment in favor of St. Jude, and remand this action with a directive to the trial court to impose a constructive trust against St. Jude and order restitution of NFT's $500,000.

Certificate of Compliance

I hereby certify pursuant to RAP 18.17(b) that the foregoing Petition for Review contains 4999 words.

RESPECTFULLY SUBMITTED this 29th day of August 2022.

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APPENDIX

FILED
5/31/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

HAZELRIGG, J. — The Nguyen Family Trust (NFT) appeals from an order dismissing its claim for equitable relief against St. Jude Children's Research Hospital. Because NFT was provided an adequate remedy at law by way of a jury verdict against Darlene Piper, which was reduced to a judgment after trial, the court did not err in dismissing its claim for equitable relief against the hospital.

FACTS

In 2014, attorney Darlene Piper was administering the estate of Jack Yates as his personal representative. She invested the estate's money, along with some

of her own, into a mortgage-backed loan in Paraguay. In August 2015, Piper began discussing investment opportunities in Paraguay with her longtime friend, Tina Chapman, as Piper had previously invested there with success and Chapman was experiencing delays with a potential real estate investment. Eventually, Chapman agreed to invest $500,000 in Paraguayan bonds, and transferred $515,000 to Piper.[1] On September 9, 2015, Piper confirmed via text message that she received the money from Chapman and would "set up the wire to Paraguay." Chapman later testified she believed the funds were being invested in bonds and that she would not have agreed to invest in a mortgage-backed loan. Piper admitted that she ultimately directed the money into a mortgage-backed loan despite Chapman not fully understanding the investment.

In August 2017, Chapman[2] filed a suit against Piper, alleging a violation of Washington's securities act,[3] fraud, unjust enrichment, and negligent misrepresentation. Chapman/NFT later amended its complaint to add the "American Lebanese Syrian Associated Charities, Inc. doing business as St. Jude Children's Research Hospital" (STJ) as a defendant and changing its third cause of action against Piper to conversion. NFT alleged STJ had been unjustly enriched as a consequence of Piper's bad acts, and sought equitable relief from STJ on that basis. NFT alleged the funds STJ received from Piper were the same funds NFT had given to Piper for an investment. STJ argued the funds were properly received

[1] $15,000 was repayment for a loan Piper had previously made to Chapman unrelated to the present litigation.

[2] During trial, the Nguyen Family Trust was substituted as plaintiff for Chapman, as the trust held the funds at issue and thus was the real party in interest.

[3] Ch. 21.20 RCW.

as a bequest from the estate of Jack Yates. Leading up to trial, NFT moved to bifurcate the proceeding, requesting that a jury determine its legal claims against Piper, after which the court would decide its equitable claims against STJ. The court granted the motion, but provided that STJ would "be allowed to fully participate" in the jury trial.

The jury found Piper had violated the state securities act, converted NFT's property, and committed fraud. For the securities act claim and the conversion claim, the jury found in its special verdict forms that the damages for each were $500,000. The jury additionally found the damages for both claims were duplicative. It awarded $62,500 in damages for the fraud claim, which were not duplicative of damages awarded for any other claims.[4] After the trial concluded, STJ brought a summary judgment motion to dismiss, arguing NFT's equitable claim against it failed as a matter of law. The court agreed and granted the motion. NFT timely appealed.

ANALYSIS

NFT argues it is entitled to equitable relief against STJ because it lacks an adequate remedy at law. It alleges its money judgment against Piper is an "illusory remedy" because Piper lacks financial resources to satisfy the judgment. It also contends the money judgment against Piper is not an adequate legal remedy because the same funds converted by Piper are now held by STJ.

[4] This amount reflected the interest Piper promised Chapman as a return on her investment in bonds.

Piper testified that in 2015, she assigned the interest in the mortgage-backed loan to NFT via the $500,000 payment from Chapman. STJ alleges at this point, the $500,000 payment became the property of the Yates estate and was properly gifted to STJ pursuant to Yates' will. NFT argues, however, that the Yates loan was in default, as Piper testified that the recipient of the loan had stopped making payments in July 2015. It contends Piper took the money from NFT and represented it as a bequest to STJ on behalf of the Yates' estate.

As a preliminary matter, NFT argues it brought three separate causes of action against STJ for equitable relief: restitution, unjust enrichment, and a request for a constructive trust. It relies primarily on a case from our state Supreme Court, Nelson v. Appleway Chevrolet, Inc. 160 Wn.2d 173, 187, 157 P.3d 847 (2007). There, the court relied on the Restatement (Third) of Restitution in holding that "restitution has roots in both equity and the law." Id. The court went on to say that "restitution is more than a simple contract remedy. It is 'itself a source of obligations, analogous in this respect to tort or contract.'" Id. at 188 (quoting RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. h at 12–13 (Discussion Draft 2000)). However, contrary to NFT's assertions, nothing in Nelson provides for separate causes of action for restitution and unjust enrichment.[5] While the court did state restitution is a "source of obligations" rather than a remedy, it frames unjust enrichment as a wrong rather than a cause of action. Id. at 188 ("Unjustified enrichment is enrichment that lacks an adequate

[5] In briefing and at oral argument before this court, NFT cites the Restatement as controlling. However, it is a secondary source, not binding legal precedent. As an intermediate appellate court, we follow case law from our state Supreme Court.

legal basis: it results from a transfer that the law treats as ineffective to work a conclusive alteration in ownership rights.") (quoting RESTATEMENT (THIRD) OF RESTITUTION § 1 cmt. b at 3).

This is consistent with another portion of the Restatement (Third) of Restitution and Unjust Enrichment section 1, which states "The law of restitution is predominantly the law of unjust enrichment, but 'unjust enrichment' is a term of art." Unjust enrichment is the wrong, restitution is the remedy, and the two are used interchangeably to label causes of action. See, e.g., Seattle Mortg. Co. v. Unknown Heirs of Gray, 133 Wn. App. 479, 498, 136 P.3d 776 (2006) ("[A] party must make restitution where it has been unjustly enriched at the expense of another."), see also Ehsani v. McCullough Fam. P'ship, 160 Wn. 2d 586, 594, 159 P.3d 407 (2007) ("[T]he purpose of restitution is to remedy unjust enrichment."), see also Davenport v. Wash. Educ. Ass'n, 147 Wn. App. 704, 737, 197 P.3d 686 (2008) ("[A] common law cause of action for unjust enrichment . . . is equivalent to a cause of action for restitution or implied in law contract."). A constructive trust, likewise, is a remedy. This court has held that "[a] constructive trust is an equitable remedy" whose "primary purpose . . . is to prevent unjust enrichment." Consulting Overseas Mgmt., Ltd. v. Shtikel, 105 Wn. App. 80, 86–87, 18 P.3d 1144 (2001). Here, NFT has only one cause of action against STJ, whether it is labelled as restitution, unjust enrichment, or a request for a constructive trust.

Next, NFT argues the trial court erred in finding it was not entitled to an equitable remedy. "A court will grant equitable relief only when there is a showing that a party is entitled to a remedy and the remedy at law is inadequate." Sorenson

v. Pyeatt, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006) (emphasis added). As a general rule, "courts will not exercise equity jurisdiction when there is a clear, adequate, complete, and speedy remedy at law." Columbia State Bank v. Invicta L. Grp. PLLC, 199 Wn. App. 306, 316, 402 P.3d 330 (2017). "'Where the remedy by action for damages is inadequate or insufficient to do complete justice between the parties, equity will take jurisdiction and grant proper relief.'" Id. at 317 (quoting 30A C.J.S. Equity, § 25, 237 (2007)). Because "it is a well-established rule that an equitable remedy is an extraordinary, not ordinary, form of relief," the remedy at law must be inadequate. Sorenson, 158 Wn.2d at 531.

In Sorenson, our state Supreme Court analyzed whether there was an adequate remedy at law for a group of lenders seeking equitable estoppel and invalidation of a deed. Id. at 542. The court first noted that it thought "it a good equity policy that the person against whom the legal remedy is sought and authorized should be the same person against whom the equitable remedy is sought." Id. at 543. It then considered an argument by the lenders that they would "likely never be accorded full relief for their losses" because of the Pyeatts' "lack of funds and property to satisfy the judgment" awarded. Id. at 543–44. The court did not find this argument compelling, holding "The trial court's entry of judgment in favor of the [l]ender claimants on the money owed to them by Barbara Pyeatt is sufficient evidence that a remedy at law exists," and therefore the lenders were not entitled to an equitable remedy. Id. at 543. "[A]lthough the likelihood of full payment is small," the court concluded "the remedy at law . . . is valid." Id. at 544.

Similarly, NFT's speculation that Piper will never pay a money judgment is a separate question from whether it has an adequate remedy under the law. NFT sued Piper for a variety of claims, tried the case to a jury, and won a significant money judgment (including an award of attorney fees under the state securities act). This successful money judgment is "sufficient evidence that a remedy at law exists," regardless of any speculation about whether Piper will satisfy the judgment. See Id.

NFT also relies on a more recent case from this court, Columbia State Bank, 199 Wn. App. 306. There, the court upheld an equitable claim of successor liability despite Invicta Law Group's argument that there was an adequate remedy at law. It stated "A court may grant relief in both law and equity" notwithstanding the "general rule . . . that courts will not exercise equity jurisdiction when there is a clear, adequate, complete, and speedy remedy at law." Id. at 316. It is true that if "'the remedy by action for damages is inadequate or insufficient to do complete justice between the parties, equity will take jurisdiction and grant proper relief.'" Id. at 317 (quoting 30A C.J.S. Equity, § 25, 237 (2007)).

There are several key distinctions between Columbia State Bank and the case before us. First, the court in Columbia State Bank rooted its analysis narrowly in successor liability, rejecting Invicta Law Group PLLC's invitation to apply principles from equitable liens case law. Id. at 317 (distinguishing Seattle Mortgage Co., 133 Wn. App. 479). In Columbia State Bank, Invicta Law Group was a sole proprietorship formed by Mark Jordan. Id. at 312. The court determined that Invicta Law Group was a successor in liability to Invicta Law Group PLLC,

which Jordan had formed and where he served as the sole member and manager. Id. Jordan "us[ed] the same name, website, signage, telephone number, offices, insurance, employees, and equipment, and represent[ed] the same clients," using the name Invicta Law Group PLLC on "new client engagement letters for nearly six months." Id. at 314. This is clearly distinguishable from the relationship between Piper and STJ, which were separate entities and whose relationship arose out of a single transaction pursuant to Yates' will.

The court in Columbia State Bank also distinguished the Sorenson case because Invicta Law Group PLLC was a successor to the debtor rather than "an innocent third party" and because the trial court had found Columbia State Bank's legal remedy was inadequate to satisfy the debt. Id. at 318. Finally, Columbia State Bank also distinguished Gall Landau Young Construction Co. v. Hedreen "because [Gall Landau Young Construction Co. (GLY)]'s claim in bankruptcy court was on appeal and therefore not certain, and also because there was 'no guaranty' that GLY's bankruptcy claim would provide complete relief." Id. (quoting 63 Wn. App. 91, 99–100, 816 P.2d 762 (1991)).

Here, NFT did not seek relief under a successor liability theory. Columbia State Bank expressly rejected cases cited by Invicta Law Group which did not concern successor liability, significantly narrowing the scope of its decision. Additionally, no party appealed the money judgment against Piper, so the legal remedy at issue here is not uncertain like the one in Gall Landau Young Construction. This case is much more like Sorenson, as NFT has successfully obtained a money judgment against Piper, including an award of attorney fees.

NFT's speculation that Piper will be unable to satisfy the judgment, based only on Piper's own self-serving bankruptcy filings from 2017, is not sufficient to demonstrate that its legal remedy is inadequate. Additionally, NFT's strategy of seeking a legal remedy against Piper and an equitable remedy against STJ is contrary to the general policy statement in Sorenson that the person against whom a legal and equitable remedy is sought should be the same.

As Sorenson notes, adequacy of a legal remedy is not simply the likelihood of a judgment being satisfied. This is consistent with cases from the U.S. Supreme Court and our state Supreme Court. "By inadequacy of the remedy at law is here meant, not that it fails to produce the money—that is a very usual result in the use of all remedies—but that in its nature or character it is not fitted or adapted to the end in view." Thompson v. Allen County, 115 U.S. 550, 554, 6 S. Ct. 140, 29 L. Ed. 472 (1885). This is consistent with our state Supreme Court's holding in Kucera v. Department of Transportation, which stated,

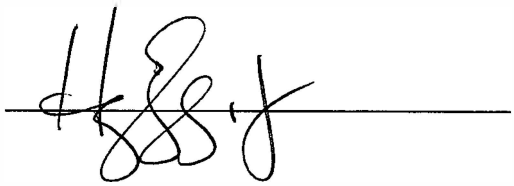
> Courts have generally found remedies to be inadequate in three circumstances: (1) the injury complained of by its nature cannot be compensated by money damages, (2) the damages cannot be ascertained with any degree of certainty, and (3) the remedy at law would not be efficient because the injury is of a continuing nature.

140 Wn.2d 200, 210, 995 P.2d 63 (2000). Our courts have held, for example, that "[s]ince real estate is considered unique, damages do not adequately compensate a purchaser for a seller's breach of a contract to purchase specific land." Carpenter v. Folkers, 29 Wn. App. 73, 76, 627 P.2d 559 (1981).

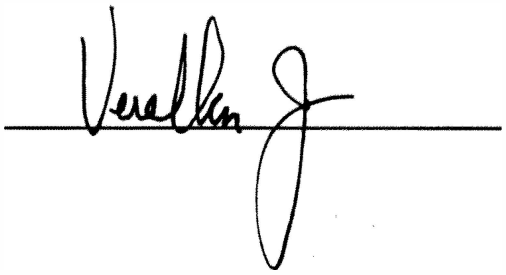
Here, NFT sought the return of a specific amount of money converted. This is unlike conversion of real property, which is considered unique. The damages

can also be ascertained with certainty, as NFT sought a specific amount of damages against STJ, and the jury awarded monetary damages in NFT's suit against Piper. NFT has not argued that the injury is of a continuing nature. Its speculation that Piper will not satisfy the judgment does not make the legal remedy NFT received inadequate and therefore the court did not err in dismissing its equitable claim against STJ. Because we find NFT has a complete, adequate, and clear remedy at law, it is not entitled to an equitable remedy against STJ.[6]

Affirmed.[7]



WE CONCUR:



[6] Because this issue is dispositive, we need not reach NFT's other assignments of error.

[7] In its response brief, STJ asked this court to strike appendices in NFT's opening brief that contained facts outside of the record. NFT submitted an amended brief, removing those appendices. However, NFT attached additional appendices to its reply brief, which also contained facts outside of the record. We decline to consider them.

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

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

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

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

For the Court:

Judge

NO. 83416-9

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

NGUYEN FAMILY TRUST,

Appellant,

v.

DARLENE PIPER and AMERICAN LEBANESE
SYRIAN ASSOCIATED CHARITIES, INC.,
d/b/a ST. JUDE CHILDREN'S RESEARCH HOSPITAL

Respondent.

APPELLANT NGUYEN FAMILY TRUST'S MOTION RE JUDICIAL NOTICE

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Comes now the Appellant, Nguyen Family Trust, by and through its attorney, Thomas F. Gallagher of Gallagher Law, PLLC, and hereby moves the Court for the following relief:

I. Relief Requested

1. For the withdrawal of Appendix 1 (WSBA Resignation Form of Darlene Ann Piper) and Appendix 2 (Eight count felony Indictment in United States v. Darlene A. Piper) from the Appellant's Brief; and

2. For an order allowing judicial notice of the August 30, 2021, Plea Agreement by Darlene A. Piper in *United States v. Piper*, CR20-5372JRB.

II. Facts relevant to the withdrawal of Appendices 1 and 2 to the Appellant's Brief.

The present appeal centers around whether Respondent American Lebanese Syrian Associated Charities, Inc. d/b/a/ St. Jude Children Research Hospital ("St. Jude") must provide restitution and return $500,000 it received that a jury found was converted from Appellant Nguyen Family Trust by former

Attorney Darlene Piper.[1] The trial court dismissed the Nguyen Family Trust's claim for restitution and unjust enrichment against St. Jude on summary judgment.[2] It is that dismissal that is before the Court of Appeals on appeal.[3]

Attached to the Nguyen Family Trust's opening Appellant's Brief at Appendix 1 is a WSBA Resignation Form of Darlene Ann Piper ("Piper") wherein Piper resigned in lieu of discipline and disbarment arising out of the facts of the present case and one other matter. Attached to the Nguyen Family Trust's Appellant's Brief at Appendix 2 is an eight count Federal Felony Indictment in *United States v. Piper,* CR20-5372JRB, arising solely out of the facts of this case. In attaching those two appendices, the Nguyen Family Trust cited to ER 201(b) and ER 201(f) for the proposition that "Judicial notice may be taken at any stage of the proceeding." However, in doing so, the Nguyen Family Trust overlooked RAP 9.11 (providing restrictions on additional evidence on review) and

[1] CP 627-630.
[2] CP 773-775.
[3] CP 780-788.

9.12 (limiting review on summary judgment to evidence and issues called to the attention of the trial court).

Given the restrictions in RAP 9.11 and 9.12 regarding additional evidence on review and on review of a summary judgment decision, Appellant Nguyen Family Trust requests that Appendices 1 and 2 to Appellant Nguyen Family Trust's opening Appellant's Brief be removed.

III. Facts related to the request for judicial notice of Plea Agreement by Darlene A. Piper in *United States v. Piper*.

On September 9, 2015, at Tina Chapman's direction, her son, Jimmy Nguyen, deposited $515,000[4] into Piper's IOLTA trust account.[5] Tina Chapman[6], Jimmy Nguyen,[7] and Piper[8] all understood that the deposit was for Piper to invest $500,000 of the money in Paraguayan bonds. Prior to the September 9, 2015, deposit of $515,000, Piper's IOLTA trust account only

[4] RP V.2., p. 82. $15,000 of the $515,000 was repayment amounts owed to Piper for the purchase of restaurant equipment. The balance of $500,000 was to be invested by Piper into bond funds.
[5] CP 1035; CP 831-832. The Nguyen Family Trust was substituted as Plaintiff in place of Tina Chapman on November 19, 2021. CP 601-602.
[6] RP V.2, p. 104-105, 110, 125
[7] RP V.8, p. 85; RP V. IV, p. 44 (testimony from 11/18/19)
[8] RP V.4, p. 76; RP V.8, p 6.

had a balance of $866.76.[9] On October 1, 2015, Piper sent the Nguyen Trust' $500,000 to St. Jude on October 1, 2015, claiming it was a bequest on the part of an estate.[10]

As stated above, at the conclusion of trial, the jury found that Piper converted the Nguyen Family Trust's $500,000.[11] In fact, the jury specifically found that the same $500,000 in damages for Piper's conversion were duplicative of the $500,000 the jury awarded for Piper's violation of Washington's Securities Act.[12]

Despite the jury's verdict that Piper converted the Nguyen Family Trust's $500,000 and violated Washington's Securities Act in doing so, St. Jude continues to argue on appeal that Piper *actually invested* the Nguyen Family Trust's money into a mortgage-backed loan to Paraguayan arms dealer Ever Marengo. In fact, in St. Jude's Respondent's Brief, St. Jude

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[9] CP 1044-1049 (Ex. 77)
[10] CP 947-950 (Ex. 49). CP 1044-1049 (Ex. 77)
[11] CP 627-629 (Verdict Form).
[12] A scheme to sell a security by taking money for investment purposes, and then never making the investment is a contract of sale for a security and is a violation of Washington's Securities Act. *McClellan v. Sundholm*, 89 Wn.2d 527, 533, 574 P.2d 371 (1978).

repeats this allegation fifteen (15) times. The following are excerpts from St. Jude's Respondent's Brief:

1. ". . .Ms. Piper lost $500,000 by investing it in a fractional interest of a mortgage-backed security that defaulted in Paraguay." Respondent's Brief at Page 1.

2. "In fact, Ms. Piper invested the funds (alongside her own) in the risky mortgage-backed security." Respondent's Brief at Page 1.

3. "It awarded the Trust $500,000 in damages and an additional $62,500 in interest that the Trust would have received had Ms. Piper invested the funds in Paraguayan bonds as the Trust expected rather than in a Paraguayan mortgage-backed security as was done." Respondent's Brief at Pages 1-2

4. "Both testified at trial that they believed Ms. Piper was investing the Trust's funds in a Paraguayan bond as opposed to the partial interest in the mortgage-backed security (the Marengo loan) in which Ms. Piper actually invested the funds. Respondent's Brief at Page 4

5. "Thus, the jury found that Ms. Piper converted Plaintiff's funds by investing them in the Marengo loan." Respondent's Brief at Page 9

6. "But this argument contradicts the evidence at trial and the Trust's earlier admission that the jury found that Ms. Piper sold a security (i.e., Marengo loan) to the Trust in violation of the WSSA." Respondent's Brief at Page 16

7. "The jury was not confused and concluded that the damages for violating the WSSA were $500,000, the precise amount of money the Trust wired on September 9, 2015 to Ms. Piper for the Trust's investment in Paraguay, and the precise amount of money Ms. Piper testified she invested on the Trust's behalf." Respondent's Brief at Page 21

8. "As a matter of law, the jury's verdict stands only if Ms. Piper "is liable to the person [the Trust] buying the security [the interest in the Marengo loan] from him or her, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at eight perfect per annum from the date of payment…." Respondent's Brief at Page 22

9. "Piper had only two Paraguayan securities to offer the Trust and the jury's verdict reflects its conclusion that Ms. Piper violated the WSSA by selling the Trust the partial interest in the Marengo loan (rather than the bond) in exchange for the Trust's $500,000 payment on September 9, 2015." Respondent's Brief at Page 22

10. "In other words, Ms. Piper's investing the Trust's money in the mortgage-backed security instead of the Paraguayan bond wrongfully prevented the Trust from its funds. Respondent's Brief at Page 23

11. ". . . the Trust gained only $12,500 in interest payments from the Marengo loan security in which Piper wrongfully invested the funds." Respondent's Brief at Page 24

12. ". . .Ms. Piper defrauded the Trust by investing in the Marengo loan. . . . " Respondent's Brief at Page 24

13. "The Paraguayan investment failed, causing both Ms. Piper and the Trust significant losses. But none of those funds went to St. Jude. St. Jude, instead, lawfully received $500,000 in funds in accordance with Yates's will." Respondent's Brief at Pages 25-26

14. "But the Trust cannot claim to be the rightful owner of the $500,000 St. Jude received because it relinquished all of its legal rights to the $500,000 when it purchased the Estate's interest in the Marengo loan." Respondent's Brief at Page 33

15. "The evidence at trial demonstrates that the funds lost by both Ms. Piper and the Trust are in Paraguay and apparently beyond recovery." Respondent's Brief at Page 33

St. Jude argues that once the Nguyen Family Trust's $500,000 was deposited in Piper's trust account, the Trust obtained ownership of mortgage-backed securities interest, alongside Piper, and the $500,000 became the property of the estate Piper was administering.[13] Based on that fiction, St. Jude argues that the Nguyen Family Trust was no longer the rightful owner of any funds St. Jude received.[14]

On August 30, 2021, Piper plead guilty to wire fraud in *United States v. Piper*, CR20-5372JRB arising from her scheme to defraud and convert Nguyen Family Trust's $500,000 wherein Piper admits the following[15]:

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

[13] See Respondent's Brief at page 6.
[14] See Respondent's Brief at pages 27 and 33.
[15] The references in the Plea Agreement to "TC" refer to Tina Chapman, the settlor and beneficiary of the Nguyen Family Trust.

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

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

A copy of the Plea Agreement is attached hereto as Appendix 1. It is this Plea Agreement that the Nguyen Family Trust asks the Court to take judicial notice of, to foreclose further allegations that the Nguyen Family Trust's converted $500,000 was actually invested by Piper.

IV. Argument

1. The Rules of Appellate Procedure, and the cases applying those rules, would normally prevent judicial notice of the Piper's Federal Court Plea Agreement.

Even though ER 201 states that certain facts may be judicially noticed at any stage of a proceeding, RAP 9.11 restricts appellate consideration of additional evidence on review." *King County v. Cent Puget Sound Growth Mgmt. Hr'gs Bd*, 142 Wn.2d 543, 549 n.6, 14 P.3d 133 (2000). RAP

9.11 (a) provides that the Court of Appeals may direct that additional evidence on the merits of the case be taken before the decision of a case on review if (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through post judgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

Each of the six requirements listed in RAP 9.11(a) must be satisfied for an appellate court to take judicial notice. *Schreiner v. City of Spokane*, 74 Wn. App. 617, 620-21, 874 P.2d 883 (1994).

RAP 9.12 further restricts the record on review when the appeal concerns an order on summary judgment. RAP 9.12 provides, in part, that "[o]n review of an order granting or denying a motion for summary judgment the appellate

court will consider only evidence and issues called to the attention of the trial court.

The Nguyen Family Trust acknowledges under RPC 3.3 (requiring candor to the tribunal) that RAP 9.11 and 9.12 would ordinarily prohibit the Court of Appeals from taking judicial notice of Piper's Plea Agreement, even though it wholly arises out of the facts of this case.[16] However, it is out of respect for the requirement of candor to the tribunal that the Nguyen Family Trust seeks judicial notice of Piper's Plea Agreement. In that Plea, Piper admits in truth and in fact that she took the Nguyen Family Trust's $500,000, never invested it, and paid it to St. Jude to settle an estate. On appeal, that truth should be recognized so that this case can be decided on the merits.

2. The Court of Appeals has discretion to waive its rules to serve the ends of justice.

RAP 1.2(a) provides that the Rules of Appellate Procedure "will be liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(c)

[1616] RPC 3.3 titled "Candor to the Tribunal" provides that "(a) A lawyer shall not knowingly: . . . (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by the opposing party…."

further provides that "[t]he appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice. . . ."[17]

Our Supreme Court noted that RAP 1.2 and RAP 18.8 provides the Appellate Court with discretion to waive appellate rules to promote justice and to consider cases and issues on their merits as follows:

> Together RAP 1.2(a), RAP 1.2(c), and RAP 18.8(a) make clear that an appellate court should liberally interpret the Rules of Appellate Procedure and alter any provision included therein when necessary to promote justice and to consider cases and issues on their merits. *See State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995) (noting the discretion provided to an appellate court in RAP 1.2(a) "should normally be exercised unless there are compelling reasons not to do so"); *Weeks v. Chief of Wash. State Patrol*, 96 Wn.2d 893, 896, 639 P.2d 732 (1982) (citing RAP 1.2(a) and observing that "[a]pplying strict form would defeat the purpose of the rules to 'promote justice and facilitate the decision of cases on the merits' ").

In re Carlstad, 150 Wn.2d 583, 597, 80 P.3d 587 (2003).

As the Supreme Court noted in *Sears v. Grange Ins. Ass'n*, 111 Wn.2d 636, 640, 762 P.2d 1141, 1143 (1988)(overruled on

[17] RAP 18.8 similarly provides that "[t]he appellate court may, on its own initiative or on motion of a party, waive or alter the provisions of any of these rules. . . in order to serve the ends of justice. . . ."

other grounds by *Butzberger v. Foster*, 151 Wn.2d 396, 89 P.3d 689 (2004), "[d]espite the language in RAP 9.11, we may waive its provisions to serve the ends of justice, pursuant to RAP 1.2 and 18.8, and consider Defendant's motion [to allow additional evidence on review]."

Here, the Nguyen Family Trust requests that the Court of Appeals waive the restrictions in RAP 9.11 and 9.12 to allow judicial notice of the Piper's guilty plea. A guilty plea to a criminal offense is a confession of guilt whose result is equivalent to conviction. *State v. Schimmelpfennig*, 92 Wn.2d 95, 104, 594 P.2d 442 (1979)(*citing In re Woods v. Rhay*, 68 Wn.2d 601, 414 P.2d 601 (1966)). The defendant pleading guilty acknowledges full responsibility for the legal consequences of his or her guilt. *State v. Pringle*, 83 Wn.2d 188, 517 P.2d 192 (1973).

Moreover, judicial notice of Piper's guilty plea does not frustrate the purpose behind the restrictions on additional evidence on review set forth in RAP 9.11 and RAP 9.12. The purpose behind restricting additional evidence on review was

described by our Supreme Court in *Swak v. Dep't of Lab. & Indus.*, 40 Wn.2d 51, 54, 240 P.2d 560 (1952) as follows:

> The decision of a cause must depend upon the evidence introduced. If a court should take judicial notice of facts adjudicated in a different case, even between the same parties, it would make those facts, unsupported by evidence in the case in hand, conclusive against the opposing party; while if they had been properly introduced, they might have been controverted and overcome.

The purpose of restricting additional evidence that the opposing party has not had an opportunity to controvert would not be offended by judicial notice of Piper's guilty plea when that plea cannot reasonably be questioned or controverted.

In *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989), the Fourth Circuit Court of Appeals analyzed whether it should consider taking judicial notice of subsequent guilty pleas on appeal. In *Colonial Penn*, homeowners were involved in a lawsuit with their insurer over coverage for a fire loss at their home. The insurer made an FRCP 68 offer of judgment to the homeowners, who accepted the offer. Five days later, the insurer learned that the homeowners may have

been involved in setting the fire. The insurer sought to withdraw the offer of judgment. However, the District Court held that the acceptance of the offer of judgment was binding on the insurer. The insurer appealed. *Colonial Penn,* 887 F.2d at 1237-1238.

On appeal, the insurer asked the Fourth Circuit Court to take judicial notice of the homeowners' guilty pleas to being an accessory after the fact to commit arson that were entered two months after the District Court's ruling that the FRCP 68 offer of judgment was binding. *Id.* at 1239.

The Fourth Circuit Court began its analysis regarding whether the subsequent guilty pleas should be considered on appeal with an acknowledgement that "an appellate court normally will not consider facts outside the record on appeal." *Id.* However, the Court held that "that in the interest of justice we may properly take judicial notice of the [homeowners] guilty pleas involving the very property and issues involved in this proceeding." *Id.*

In deciding to take judicial notice of the guilty pleas, the Court also analyzed the standard for judicial notice under Fed.R.Evid. 201(b)(2) which provides "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is ... capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[18] *Id.* The Court held that the homeowners' guilty pleas were "not subject to reasonable dispute," and that these records are properly subject to judicial notice pursuant to Fed.R.Evid. 201(b)(2). *Id.* at 1240.

In the case at bar, Piper's guilty plea is the type of evidence that "cannot reasonably be questioned" under ER 201(b). Judicial notice of Piper's guilty plea would foreclose further argument that the Nguyen Family Trust's $500,000 was actually invested by Piper and that the Nguyen Family Trust's money therefore became the lawful property of the estate Piper was administering. Piper herself admits that she took the

[18] The operative portion of Federal Evidence Rule 201(b)(2) is identical to ER 201(b) that provides "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is . . . (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Nguyen Family Trust's $500,000, never invested the money, but instead paid it to St. Jude as a purported bequest.

Allowing judicial notice of Piper's guilty plea in this appeal also promotes candor to the tribunal. RPC 3.3 requires truth-telling and the prompt correction of any false statements as follows:

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

While the jury's findings at trial that Piper converted the Nguyen Family Trust's $500,000 (coupled with the bank records showing the Trust's money was sent to St. Jude) *should* preclude arguments that Piper actually invested the money for

the Nguyen Family Trust, that is not the case. As stated above, on fifteen (15) occasions, St. Jude alleges in its Respondent's Brief that Piper invested the Nguyen Family Trust's $500,000 in the loan to Paraguayan arms dealer Ever Marengo. Piper's guilty plea makes it clear that she *never* invested the Nguyen Family Trust's $500,000. Instead, Piper paid the Nguyen Family Trust's $500,000 to St. Jude to settle an estate.

To continue arguing that the Nguyen Family Trust's money was invested by Piper does not comport with the truth-telling requirements of RPC 3.3.

V. Conclusion

Based on the foregoing argument, the Nguyen Family Trust requests that the Court withdraw of Appendix 1 (WSBA Resignation Form of Darlene Ann Piper) and Appendix 2 (Eight count felony Indictment in United States v. Darlene A. Piper) from the Appellant's Brief. The Nguyen Family Trust further requests that the Court take judicial notice of the August 30, 2021, Plea Agreement by Piper in *United States v. Piper*, CR20-5372JRB.

Certificate of Compliance

I hereby certify pursuant to RAP 18.7(b) that the foregoing Response contains 3427 words.

Respectfully submitted this 11th day of February 2022.

GALLAGHER LAW, PLLC

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Judge Bryan

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff, v. DARLENE A. PIPER, Defendant.	NO. CR20-5372RJB **PLEA AGREEMENT**

The United States of America, by and through Tessa M. Gorman, Acting United States Attorney for the Western District of Washington, Michael Dion, Assistant United States Attorney, and Defendant DARLENE A. PIPER and Defendant's attorneys, Miriam Schwartz and Colin Fieman, enter into the following Agreement, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(B).

1. **The Charge**. Defendant, having been advised of the right to have this matter tried before a jury, agrees to waive that right and enter a plea of guilty to the following charge contained in the Indictment: Wire Fraud, as charged in Count 1, in violation of Title 18, United States Code, Section 1343.

By entering a plea of guilty, Defendant hereby waives all objections to the form of the charging document. Defendant further understands that before entering any guilty

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plea, Defendant will be placed under oath. Any statement given by Defendant under oath may be used by the United States in a prosecution for perjury or false statement.

2. **Elements of the Offense**. The elements of Wire Fraud, as charged in Count 1, in violation of Title 18, United States Code, Section 1343, are as follows: First, the defendant devised or knowingly participated in a scheme or plan to defraud in order to obtain money or property; Second, the scheme to defraud was material, that is, it would reasonably influence a person to part with money or property; Third, the defendant acted with the intent to defraud; and Fourth, the defendant used, or caused to be used, an interstate wire communication to carry out or attempt to carry out an essential part of the scheme.

3. **The Penalties**. Defendant understands that the statutory penalties applicable to the offense of Wire Fraud, as charged in Count 1, in violation of Title 18, United States Code, Section 1343, are as follows: imprisonment for up to twenty (20) years, a fine of up to two hundred fifty thousand dollars ($250,000.00), a period of supervision following release from prison of up to three (3) years, and a one hundred dollar ($100.00) penalty assessment. If Defendant receives a sentence of probation, the probationary period could be up to five (5) years. Defendant agrees that the special assessment shall be paid at or before the time of sentencing.

Defendant understands that supervised release is a period of time following imprisonment during which Defendant will be subject to certain restrictive conditions and requirements. Defendant further understands that, if supervised release is imposed and Defendant violates one or more of the conditions or requirements, Defendant could be returned to prison for all or part of the term of supervised release that was originally imposed. This could result in Defendant serving a total term of imprisonment greater than the statutory maximum stated above.

Defendant understands that as a part of any sentence, in addition to any term of imprisonment and/or fine that is imposed, the Court may order Defendant to pay restitution to any victim of the offense, as required by law.

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Defendant further understands that the consequences of pleading guilty may include the forfeiture of certain property, either as a part of the sentence imposed by the Court, or as a result of civil judicial or administrative process.

Defendant agrees that any monetary penalty the Court imposes, including the special assessment, fine, costs, or restitution, is due and payable immediately and further agrees to submit a completed Financial Statement of Debtor form as requested by the United States Attorney's Office.

Defendant understands that, if pleading guilty to a felony drug offense, Defendant will become ineligible for certain food stamp and Social Security benefits as directed by Title 21, United States Code, Section 862a.

4. **Immigration Consequences.** Defendant recognizes that pleading guilty may have consequences with respect to Defendant's immigration status if Defendant is not a citizen of the United States. Under federal law, a broad range of crimes are grounds for removal, and some offenses make removal from the United States presumptively mandatory. Removal and other immigration consequences are the subject of a separate proceeding, and Defendant understands that no one, including Defendant's attorney and the Court, can predict with certainty the effect of a guilty plea on immigration status. Defendant nevertheless affirms that Defendant wants to plead guilty regardless of any immigration consequences that Defendant's guilty plea may entail, even if the consequence is Defendant's mandatory removal from the United States.

5. **Rights Waived by Pleading Guilty.** Defendant understands that by pleading guilty, Defendant knowingly and voluntarily waives the following rights:

a. The right to plead not guilty and to persist in a plea of not guilty;

b. The right to a speedy and public trial before a jury of Defendant's peers;

c. The right to the effective assistance of counsel at trial, including, if Defendant could not afford an attorney, the right to have the Court appoint one for Defendant;

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d. The right to be presumed innocent until guilt has been established beyond a reasonable doubt at trial;

e. The right to confront and cross-examine witnesses against Defendant at trial;

f. The right to compel or subpoena witnesses to appear on Defendant's behalf at trial;

g. The right to testify or to remain silent at trial, at which trial such silence could not be used against Defendant; and

h. The right to appeal a finding of guilt or any pretrial rulings.

6. **United States Sentencing Guidelines**. Defendant understands and acknowledges that the Court must consider the sentencing range calculated under the United States Sentencing Guidelines and possible departures under the Sentencing Guidelines together with the other factors set forth in Title 18, United States Code, Section 3553(a), including: (1) the nature and circumstances of the offense; (2) the history and characteristics of Defendant; (3) the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (4) the need for the sentence to afford adequate deterrence to criminal conduct; (5) the need for the sentence to protect the public from further crimes of Defendant; (6) the need to provide Defendant with educational and vocational training, medical care, or other correctional treatment in the most effective manner; (7) the kinds of sentences available; (8) the need to provide restitution to victims; and (9) the need to avoid unwarranted sentence disparity among defendants involved in similar conduct who have similar records. Accordingly, Defendant understands and acknowledges that:

a. The Court will determine Defendant's Sentencing Guidelines range at the time of sentencing;

b. After consideration of the Sentencing Guidelines and the factors in 18 U.S.C. 3553(a), the Court may impose any sentence authorized by law, up to the maximum term authorized by law;

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c. The Court is not bound by any recommendation regarding the sentence to be imposed, or by any calculation or estimation of the Sentencing Guidelines range offered by the parties or the United States Probation Department, or by any stipulations or agreements between the parties in this Plea Agreement; and

d. Defendant may not withdraw a guilty plea solely because of the sentence imposed by the Court.

7. **Ultimate Sentence**. Defendant acknowledges that no one has promised or guaranteed what sentence the Court will impose.

8. **Statement of Facts**. The parties agree on the following facts. Defendant admits Defendant is guilty of the charged offense:

Background and Overview of Scheme

DARLENE A. PIPER was an attorney who practiced law in Port Orchard, Washington. Among other things, DARLENE A. PIPER prepared wills and trusts and administered probate proceedings on behalf of clients. During November 2011, DARLENE A. PIPER prepared the Last Will and Testament (the "Will") of J.H.Y. That Will named St. Jude Children's Research Hospital as the sole beneficiary of J.H.Y.'s Estate and named DARLENE A. PIPER as the Estate's Personal Representative.

Beginning in about March of 2014, and continuing until November of 2015, DARLENE A. PIPER, acting with the intent to defraud, devised and executed a scheme to defraud the J.H.Y. Estate and an individual, "T.C.," in order to obtain money from the Estate and T.C. by materially false and fraudulent pretenses, representations, promises, and omissions. The essence of the scheme was as follows: DARLENE A. PIPER misappropriated Estate funds for her own benefit. To cover the misappropriated funds, DARLENE A. PIPER then fraudulently induced T.C. to entrust her with $500,000, which DARLENE A. PIPER stated would be invested on T.C.'s behalf. Instead of investing the $500,000, DARLENE A. PIPER gave the money to St. Jude in lieu of the funds she had misappropriated.

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Details of Scheme

J.H.Y. died on February 3, 2013. On February 4, 2013, DARLENE A. PIPER filed his Will with the Kitsap County Clerk's Office and, on that same date, the Superior Court of Kitsap County granted DARLENE A. PIPER nonintervention powers as Personal Representative of the J.H.Y. Estate. This appointment gave DARLENE A. PIPER the power and the fiduciary duty to administer the estate and distribute property in accordance with the Will.

During March 2014, DARLENE A. PIPER misappropriated $520,000 in Estate funds from a bank account she had opened in the name of the J.H.Y. Estate by commingling the funds with other funds from her personal savings, and then invested the commingled funds in excess of $800,000 in two investments in Paraguay. DARLENE A. PIPER anticipated making no less than $160,000 in interest per year, for two years, on these investments, which she planned to retain for her own personal use.

DARLENE A. PIPER did not reveal this misappropriation of funds to the Estate. In order to conceal the fact that she invested J.H.Y. Estate funds in Paraguay, DARLENE A. PIPER transferred the funds through numerous bank accounts prior to transferring the funds to Paraguay and investing them. DARLENE A. PIPER also made false statements to St. Jude to conceal the misappropriation.

To further conceal the fact that she had invested J.H.Y. Estate funds in Paraguay, DARLENE A. PIPER sought to find an alternate source of funds to disburse to St. Jude Children's Research Hospital. In order to do so, during approximately August and September 2015, DARLENE A. PIPER falsely and fraudulently told T.C. that, if T.C. gave DARLENE A. PIPER $500,000 that T.C. received from the sale of her house, DARLENE A. PIPER would invest it in secure bonds in Paraguay on T.C.'s behalf. In truth and fact, however, she planned to use the funds to close out the J.H.Y. Estate by disbursing the funds to St. Jude Children's Research Hospital.

On September 4, 2015, DARLENE A. PIPER sent an email from Kitsap County to T.C., who received the email in Gig Harbor. The email passed through Google servers

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located outside the state of Washington. The email included a document in which DARLENE A. PIPER falsely stated that she planned to invest T.C.'s funds for the benefit of T.C.

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

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

9. **Sentencing Factors**. The parties agree that the following Sentencing Guidelines provisions apply to this case:

a. a base offense level of 7, pursuant to USSG § 2B1.1(a)(1);

b. a 2-point enhancement pursuant to USSG § 3B1.3 for abuse of position of trust; and

c. the parties have agreed to request that the Court apply the 12-point enhancement pursuant to USSG § 2B1.1(b)(1)(G) that is applicable to loss between $250,000, and $550,000.

The parties agree they are free to present arguments regarding the applicability of all other provisions of the United States Sentencing Guidelines. Defendant understands, however, that at the time of sentencing, the Court is free to reject these stipulated

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adjustments, and is further free to apply additional downward or upward adjustments in determining Defendant's Sentencing Guidelines range.

10. **Acceptance of Responsibility.** At sentencing, *if* the Court concludes Defendant qualifies for a downward adjustment acceptance for acceptance of responsibility pursuant to USSG § 3E1.1(a) and Defendant's offense level is 16 or greater, the United States will make the motion necessary to permit the Court to decrease the total offense level by three (3) levels pursuant to USSG §§ 3E1.1(a) and (b), because Defendant has assisted the United States by timely notifying the United States of Defendant's intention to plead guilty, thereby permitting the United States to avoid preparing for trial and permitting the Court to allocate its resources efficiently.

11. **Government's Recommendation Regarding Imprisonment**. Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(B), the government agrees to recommend that the appropriate term of imprisonment to be imposed by the Court at the time of sentencing is a *term of not more than 21 months*. Defendant understands that this recommendation is not binding on the Court and the Court may reject the recommendation of the parties and may impose any term of imprisonment up to the statutory maximum penalty authorized by law. Defendant further understands that Defendant cannot withdraw a guilty plea simply because of the sentence imposed by the Court. Except as otherwise provided in this Plea Agreement, the parties are free to present arguments regarding any other aspect of sentencing.

12. **Restitution.** Defendant shall make restitution to victim T.C. in the amount of $500,000, with credit for any amounts already paid.

a. At sentencing, the government will request that, as part of the payment schedule, the Court order Defendant to liquidate her interest in a lot and improvements located in San Pedro Martir, Fraccion 3, Mexico, with a surface of 962.5762m2, legal description: Tax ID #1-02-163-0178, and apply all proceeds to restitution within six months after sentencing.

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b. The full amount of restitution shall be due and payable immediately on entry of judgment and shall be paid as quickly as possible. If the Court finds that the defendant is unable to make immediate restitution in full and sets a payment schedule as contemplated in 18 U.S.C. § 3664(f), Defendant agrees that the Court's schedule represents a minimum payment obligation and does not preclude the U.S. Attorney's Office from pursuing any other means by which to satisfy the defendant's full and immediately-enforceable financial obligation, including, but not limited to, by pursuing assets that come to light only after the district court finds that the defendant is unable to make immediate restitution.

c. Defendant agrees to disclose all assets in which Defendant has any interest or over which Defendant exercises control, directly or indirectly, including those held by a spouse, nominee, or third party. Defendant agrees to cooperate fully with the United States' investigation identifying all property in which Defendant has an interest and with the United States' lawful efforts to enforce prompt payment of the financial obligations to be imposed in connection with this prosecution. Defendant's cooperation obligations are: (1) before sentencing, and no more than 30 days after executing this Plea Agreement, truthfully and completely executing a Financial Disclosure Statement provided by the United States Attorney's Office and signed under penalty of perjury regarding Defendant's and Defendant's spouse's financial circumstances and producing supporting documentation, including tax returns, as requested; (2) providing updates with any material changes in circumstances, as described in 18 U.S.C. § 3664(k), within seven days of the event giving rise to the changed circumstances; (3) authorizing the United States Attorney's Office to obtain Defendant's credit report before sentencing; (4) providing waivers, consents or releases requested by the U.S. Attorney's Office to access records to verify the financial information; (5) authorizing the U.S. Attorney's Office to inspect and copy all financial documents and information held by the U.S. Probation Office; (6) submitting to an interview regarding Defendant's Financial Statement and supporting documents before sentencing (if requested by the United States Attorney's

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Office), and fully and truthfully answering questions during such interview; and (7) notifying the United States Attorney's Office before transferring any interest in property owned directly or indirectly by Defendant, including any interest held or owned in any other name, including all forms of business entities and trusts.

d. The parties acknowledge that voluntary payment of restitution prior to the adjudication of guilt is a factor the Court considers in determining whether Defendant qualifies for acceptance of responsibility pursuant to USSG § 3E1.1(a).

13. **Forfeiture**. The Defendant understands that the forfeiture of property is part of the sentence that must be imposed in this case. The Defendant agrees to forfeit to the United States immediately her right, title, and interest in all property that constitutes or is derived from proceeds traceable to her commission of the Wire Fraud scheme. All such property is forfeitable pursuant to Title 18, United States Code, Section 981(a)(1)(C), by way of Title 28, United States Code, Section 2461(c). The Defendant understands and acknowledges that, pursuant to Title 18, United States Code, Section 981(a)(2)(A), the forfeitable proceeds include "property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and **is not limited to the net gain or profit realized from the offense**" (emphasis added). This forfeitable property includes but is not limited to:

a. as agreed to by the parties, a sum of money in the amount of $500,000, representing the parties' agreed calculation of the proceeds the Defendant obtained from the Wire Fraud offense.

The Defendant understands and acknowledges that the sum of money the United States seeks to forfeit is separate and distinct from the restitution that is ordered in this case. The United States agrees, however, that as long as the restitution ordered in this case remains unsatisfied, it will request that the Attorney General apply any amounts it collects toward satisfaction of this forfeited sum to the restitution order. The United States also agrees that any amount the Defendant pays towards restitution will be credited against this forfeited sum.

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The Defendant agrees to fully assist the United States in the forfeiture of the above-described property and to take whatever steps are necessary to pass clear title to the United States, including but not limited to: surrendering title and executing any documents necessary to effectuate such forfeiture; assisting in bringing any assets located outside the United States within the jurisdiction of the United States; and taking whatever steps are necessary to ensure that assets subject to forfeiture are not sold, disbursed, wasted, hidden, or otherwise made unavailable for forfeiture. The Defendant agrees not to file a claim to any of the above-described property in any federal forfeiture proceeding, administrative or judicial, which may be or has been initiated.

The United States reserves its right to proceed against any remaining property not identified in this Plea Agreement, including any property in which the Defendant has any interest or control, if that property constitutes or is derived from proceeds of her commission of the Wire Fraud scheme.

14. **Abandonment of Contraband**. The Defendant also agrees that, if any federal law enforcement agency seized any illegal contraband that was in her direct or indirect control, she abandons any interest in that contraband and consents to its federal administrative disposition, official use, and/or destruction.

15. **Non-Prosecution of Additional Offenses**. As part of this Plea Agreement, the United States Attorney's Office for the Western District of Washington agrees not to prosecute Defendant for any additional offenses known to it as of the time of this Plea Agreement based upon evidence in its possession at this time, and that arise out of the conduct giving rise to this investigation, and moves to dismiss the remaining counts in the Indictment at the time of sentencing. In this regard, Defendant recognizes the United States has agreed not to prosecute all of the criminal charges the evidence establishes were committed by Defendant solely because of the promises made by Defendant in this Plea Agreement. Defendant agrees, however, that for purposes of preparing the Presentence Report, the United States Attorney's Office will provide the United States Probation Office with evidence of all conduct committed by Defendant.

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Defendant agrees that any charges to be dismissed before or at the time of sentencing were substantially justified in light of the evidence available to the United States, were not vexatious, frivolous or taken in bad faith, and do not provide Defendant with a basis for any future claims under the "Hyde Amendment," Pub. L. No. 105-119 (1997).

16. **Breach, Waiver, and Post-Plea Conduct.** Defendant agrees that, if Defendant breaches this Plea Agreement, the United States may withdraw from this Plea Agreement and Defendant may be prosecuted for all offenses for which the United States has evidence. Defendant agrees not to oppose any steps taken by the United States to nullify this Plea Agreement, including the filing of a motion to withdraw from the Plea Agreement. Defendant also agrees that, if Defendant is in breach of this Plea Agreement, Defendant has waived any objection to the re-institution of any charges that previously were dismissed or any additional charges that had not been prosecuted.

Defendant further understands that if, after the date of this Agreement, Defendant should engage in illegal conduct, or conduct that violates any conditions of release or the conditions of confinement (examples of which include, but are not limited to, obstruction of justice, failure to appear for a court proceeding, criminal conduct while pending sentencing, and false statements to law enforcement agents, the Pretrial Services Officer, Probation Officer, or Court), the United States is free under this Plea Agreement to file additional charges against Defendant or to seek a sentence that takes such conduct into consideration by requesting the Court to apply additional adjustments or enhancements in its Sentencing Guidelines calculations in order to increase the applicable advisory Guidelines range, and/or by seeking an upward departure or variance from the calculated advisory Guidelines range. Under these circumstances, the United States is free to seek such adjustments, enhancements, departures, and/or variances even if otherwise precluded by the terms of the Plea Agreement.

17. **Waiver of Appellate Rights and Rights to Collateral Attacks.** Defendant acknowledges that, by entering the guilty plea required by this plea agreement,

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Defendant waives all rights to appeal from Defendant's conviction, and any pretrial rulings of the Court, and any rulings of the Court made prior to entry of the judgment of conviction. Defendant further agrees that, provided the Court imposes a custodial sentence that is within or below the Sentencing Guidelines range (or the statutory mandatory minimum, if greater than the Guidelines range) as determined by the Court at the time of sentencing, Defendant waives to the full extent of the law:

a. Any right conferred by Title 18, United States Code, Section 3742, to challenge, on direct appeal, the sentence imposed by the Court, including any fine, restitution order, probation or supervised release conditions, or forfeiture order (if applicable); and

b. Any right to bring a collateral attack against the conviction and sentence, including any restitution order imposed, except as it may relate to the effectiveness of legal representation; and

This waiver does not preclude Defendant from bringing an appropriate motion pursuant to 28 U.S.C. § 2241, to address the conditions of Defendant's confinement or the decisions of the Bureau of Prisons regarding the execution of Defendant's sentence.

If Defendant breaches this Plea Agreement at any time by appealing or collaterally attacking (except as to effectiveness of legal representation) the conviction or sentence in any way, the United States may prosecute Defendant for any counts, including those with mandatory minimum sentences, that were dismissed or not charged pursuant to this Plea Agreement.

18. **Voluntariness of Plea.** Defendant agrees that Defendant has entered into this Plea Agreement freely and voluntarily, and that no threats or promises were made to induce Defendant to enter a plea of guilty other than the promises contained in this Plea Agreement or set forth on the record at the change of plea hearing in this matter.

19. **Statute of Limitations.** In the event this Plea Agreement is not accepted by the Court for any reason, or Defendant breaches any of the terms of this Plea Agreement, the statute of limitations shall be deemed to have been tolled from the date of

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the Plea Agreement to: (1) thirty (30) days following the date of non-acceptance of the Plea Agreement by the Court; or (2) thirty (30) days following the date on which a breach of the Plea Agreement by Defendant is discovered by the United States Attorney's Office.

20. **Completeness of Agreement**. The United States and Defendant acknowledge that these terms constitute the entire Plea Agreement between the parties, except as may be set forth on the record at the change of plea hearing in this matter. This Agreement binds only the United States Attorney's Office for the Western District of Washington. It does not bind any other United States Attorney's Office or any other office or agency of the United States, or any state or local prosecutor.

Dated this 30th day of August, 2021.

DARLENE A. PIPER
Defendant

MIRIAM SCHWARTZ
~~Attorney~~ for Defendant

COLIN FIEMAN
Attorney for Defendant

ANDREW FRIEDMAN
Assistant United States Attorney

MICHAEL DION
Assistant United States Attorney

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LEA ENNIS
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
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February 25, 2022

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Case #: 834169
Nguyen Family Trust, Appellant v. Darlene Piper et al., Respondents
Kitsap County Superior Court No. 17-2-01435-6

Counsel:

The following notation ruling by Commissioner Masako Kanazawa of the Court was entered on February 25, 2022, regarding Appellant's Motion Re Judicial Notice:

> Appellant's motion to withdraw appendix 1 and 2 from appellant's brief is granted. Counsel shall promptly file a corrected brief without the appendices, not later than March 10, 2022. Appellant's motion to take judicial notice of an August 30, 2021 plea agreement by Darlene A. Piper in United States v. Piper, along with respondent's objection to the motion, is referred to the panel that considers this appeal.

Sincerely,

Lea Ennis
Court Administrator/Clerk

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

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

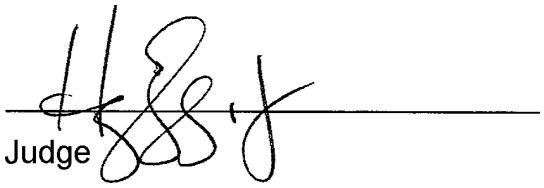
On February 11, 2022, the appellant, Nguyen Family trust, filed a "Motion Re Judicial Notice." The respondent, American Lebanese Syrian Associated Charities, Inc. d/b/a St. Jude's Children's Hospital, filed a response to the motion.

On February 25, 2022, a notation ruling by the Commissioner of this court was filed, granting the motion in part. In the ruling, the Commissioner instructed that the "[a]ppellant's motion to take judicial notice of an August 30, 2021 plea agreement by Darlene A. Piper in [United States v. Piper], along with respondent's objection to the motion, is referred to the panel that considers this appeal."

A majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion to take judicial notice be, and the same is, hereby denied.

For the Court:



Judge

Declaration of Service

1. On August 29, 2022, I served a copy of the above Appellant's Petition for Review to the following:

Washington State Court of Appeals Division One One Union Square 600 University Street Seattle, WA 98101-1176	_X_ Washington State Appellate Courts' Portal
Neil Dial, WSBA No. 29599 Eisenhower Carlson, PLLC 1201 Pacific Avenue, Suite 1200 Tacoma, WA 98402 *NDial@eisenhowerlaw.com* *KKardash@eisenhowerlaw.com*	_X_ Via Email Pursuant to the Parties' E-Service Agreement
David P. Horton, WSBA No. 27123 Templeton Horton Weibel, PLLC 3212 NW Byron Street, Suite 104 Silverdale, WA 98383 *dhorton@kitsaplawgroup.com* *tracey@kitsaplawgroup.com*	_X_ Via Email Pursuant to the Parties' E-Service Agreement
Tyler L. Farmer, WSBA No.39912 Harrigan Leyh Farmer & Thomsen, LLP 999 Third Avenue, Suite 4400 Seattle, WA 98104 Phone: (206) 623-1700 *tylerf@harriganleyh.com* *erinf@harriganleyh.com* *conniej@harriganleyh.com*	_X_ Via Email Pursuant to the Parties' E-Service Agreement

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

DATED this 29th day of August 2022, at Tacoma, Washington.

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Paralegal to Thomas F. Gallagher
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GALLAGHER LAW, PLLC

August 29, 2022 - 2:14 PM

Transmittal Information

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

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- tylerf@harriganleyh.com

Comments:

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