No. 89788-3

SUPREME COURT OF THE STATE OF WASHINGTON

RACHEL MARGUERITE ANDERSON
(formerly RACHEL M. RODGERS),

Appellant,

v.

WILLIAM L. E. DUSSAULT and JANE DOE DUSSAULT, husband and wife, and the marital community composed thereof; BARBARA J. BYRAM and JOHN DOE BYRAM, wife and husband, and the marital community composed thereof; YEVGENY JACK BERNER and JANE DOE BERNER, husband and wife, and the marital community composed thereof; WILLIAM L. E. DUSSAULT, PS, a Washington professional service corporation; the DUSSAULT LAW GROUP, a Washington corporation; RICHARD MICHAEL McMENAMIN and SHARI L. McMENAMIN, husband and wife, and the marital community composed thereof; McMENAMIN & McMENAMIN PS, a Washington professional service corporation; ANDREA DAVEY (fka ANDREA RODGERS) and JOHN DOE DAVEY, husband and wife, and the marital community composed thereof; and WELLS FARGO BANK, N.A., a foreign corporation,

Respondents.

RESPONDENT DUSSAULT'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF THE RESPONDENTS DUSSAULT

William L. E. Dussault, Barbara J. Byram, Yevgeny Jack Berner, William L. E. Dussault, PS, and the Dussault Law Group, collectively "Dussault" answer the plaintiff Anderson's petition for review.

II. ISSUES PRESENTED FOR REVIEW

Whether this Court should deny RAP 13.4(b) review, where (1) the decision of the Court of Appeals is not in conflict with decisions of this court under RAP 13.4(b)(1), and the Court of Appeals correctly analyzed RCW 11.106.070 of the Trustees' Accounting Act; (2) the facts of this case present neither a significant question of law under the Constitution of the State of Washington or of the United States nor do they involve any matter of substantial public interest under RAP 13.4(b)(3) or (4); and (3) because Anderson did not raise these issues in the trial court. Other issues including the underlying merits of the case are dispositive.

If this Court accepts review, Dussault requests that in accord with RAP 13.4(d) the Court consider and decide the following issues that Dussault raised but were not decided by the court of appeals:

1. **Dussault owed no duty to Anderson.** Dussault represented corporate trustee Wells Fargo Bank solely in the capacity of

preparing and presenting annual reports to the superior court. Did Dussault have any duty to non-client Anderson?

2. **Collateral Estoppel bars Anderson's claim against Dussault.** Anderson failed to appeal the dismissal of her mother Andrea Davey. Davey in now made to appear the actual wrongdoer and as such may have breached her fiduciary duties by placing her interests before Anderson's. Does Anderson's failure to appeal Davey's dismissal from the case estop her from asserting claims against the other defendants?

3. **Judicial Estoppel.** Is Anderson judicially estopped from arguing that the Trust was mismanaged after accepting the benefits of the Trust's management?

4. **No Violation of the Trust Agreement.** Did Dussault or any other defendant violate the terms of the Trust, which permitted purchases for transportation, computers, and real property?

5. **Dussault should be awarded attorneys' fees for answering this Petition.** Should the Supreme Court award Dussault his reasonable attorney fees and costs for defending against this petition?

III. STATEMENT OF THE CASE

The facts are thoroughly and accurately set out by the Court of Appeals and are adopted by Dussault. *Anderson v. Dussault,* 310 P.3d

854, 856 – 59 (Wn. App. 2013). Dussault's participation is summarized by the Court of Appeals:

> ¶ 6 . . . Wells Fargo hired Dussault to prepare its annual reports for court approval. Dussault filed his first report to the court on January 25, 2000. The first report detailed all investment activities and trust disbursements between the trust's establishment date (August 25, 1997) and August 31, 1999. Among other expenses, the report stated that trust funds were used for "vehicle expenses in the total of $14,159.98" including the "purchase of a 1997 Mercury Tracer." 2 CP at 351. The superior court approved the report in its entirety. Dussault submitted the second report on February 12, 2001, which covered "all financial activity" from September 1, 1999 through August 31, 2000. 2 CP at 356. This report stated that "[d]isbursements from the Trust were in the total amount of $41,461.86" and included the "purchase of real estate." 2 CP at 356. The superior court also approved this report in its entirety. . . .
>
> ¶ 9 . . . Dussault delayed presenting the report for court approval while he "attempted to address Mr. Gay's concerns." 2 CP at 347. In July of 2002, McMenamin resigned from his voluntary position as a member of the [Trust Advisory Committee (TAC)] "when it became apparent that there were ongoing problems with the disgruntled non-custodian parent ([Anderson's] father)." 2 CP at 288.
>
> ¶ 10 On December 6, 2002, Dussault submitted a two-year report for approval by the superior court. The report covered all financial activity undertaken by the trust between September 2000 and August 2002. The report noted that the "members of the TAC wish to dissolve the TAC and have the trustee assume all the functions designated to [the] TAC pursuant to the terms of the Trust." 2 CP at 372. The parties, including Gay, were notified that the trial court would hold a hearing related to the trustee report on July 11, 2003. Neither Gay nor his clients,

> Anderson's father and grandmother, appeared at the hearing. At the hearing, after "having heard the presentation of counsel, [and] having considered the files and records" related to the report, the superior court approved Dussault's report. 2 CP at 375. Additionally, the superior court dissolved the TAC and assigned Wells Fargo as the trustee "to carry out all of the duties of the TAC under the terms of the Trust Agreement." 2 CP at 375. The trial court's approval of the report was not appealed.
>
> ¶ 11 From December 23, 2003 to December 4, 2009, the trial court approved four additional reports, none of which were objected to by any interested party. The last such report was approved by the superior court on December 4, 2009, when Anderson was 19 years old. The superior court requested that the next report be filed toward the end of 2011.

Idem.

IV. ARGUMENT

A. Anderson does not meet the criteria for review and she did not raise any of the issues she now wishes this Court to decide in the trial court.

1. Anderson did not raise the issues she now asks this court to decide in the trial court.

Anderson claims error in the Court of Appeals based on a conflict with this Court's decisions in *Schroeder v. Weighall,* No.87207-4 (January 16, 2014); *Gilbert v. Sacred Heart Med. Ctr.*, 127 Wn.2d 370, 900 P.2d 552 (1995); and *Merrigan v. Epstein*, 112 Wn.2d 709, 773 P.2d 78 (1989). She further claims error in the Court of Appeals interpretation of RCW 11.106.070.

"On 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." RAP 9.12 The defendants clearly raised the issue of the Trustee Accounting Act and specifically RCW 11.106.070. CP 150-52, 334-35, 445. Anderson did not cite this statute in her response to the defendants' motions for summary judgment. While Anderson addressed the bar the Act raises to after-the-fact challenges, CP 89-91, she claimed the Act did not apply because the trust was not an express trust but one created by the court and the Act did not apply unless a guardian ad litem were appointed. *Id.* The analysis in *Gilbert* and *Merrigan* is not new or novel, but none of the parties discussed these cases in the trial court.

Washington courts "do not generally consider on appeal issues not briefed or argued in the trial court." *Associated Gen. Contractors of Wash. v. King County*, 124 Wn.2d 855, 859, 881 P.2d 996 (1994); *see Torres v. City of Anacortes*, 97 Wn. App. 64, 80, 981 P.2d 891 (1999). In her response to Dussault's motion for summary judgment, Anderson did not address several of Dussault's key arguments. CP 30-31.

Anderson did not address the problem that she was challenging a decree entered years before. Even if the statute of limitations was tolled,

relief from an order or decree must be brought under CR 60 and must be brought within one year. Anderson was two years late. CP 448-50. She did not address that defense. CP 30, 83,

Dussault demonstrated that Washington law did not permit the Trust to collect rent from Mr. Lancaster. CP 439. Anderson made no response. This claim for rent amounts to over $20,000 and is over a third of her damage claim. CP 83-93, 439.

Anderson rested on her bare assertion that expenditures on the vehicle, the computer, and Joe Lancaster's home were inappropriate. CP 86. Dussault spent considerable time showing that these were authorized expenses and permitted by the Trust. CP 436-40. Anderson made no counter arguments and presented no applicable authority. CP 86, 436-40.

Dussault presented a detailed discussion explaining the discretion afforded a trustee, how the TAC and Wells Fargo appropriately followed the Trust, and Dussault's lack of participation in this process. CP 436-40. Anderson does not ascribe any of the trust management to Dussault or explain how he is responsible for it. Her opening brief in the Court of Appeals only discussed this in relation to McMenamin and Wells Fargo. Brief 27-31. She has abandoned this claim against Dussault concerning trust management. Courts will not consider arguments not supported by

citation to legal authority and the record. *Fishburn v. Pierce County Planning & Land Services Dept.*, 161 Wash. App. 452, 468, 250 P.3d 146 *review denied*, 172 Wash. 2d 1012, 259 P.3d 1109 (2011).

2. This case does not satisfy the standards for review under RAP 13.4(b).

Anderson's petition for review does not present a proper basis for review by this Court under RAP 13.4(b)(1)-(4). RAP 13.4(b) provides that the Supreme Court will accept a petition for review only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Anderson bases her petition on subsections (1), (3) and (4), but there is no conflicting authority, no conflict with the constitution and no public interest issues exist under these facts.

Even if the Court overlooks Anderson' failure to present these issues to the trial court, her reliance on *Schroeder*, *Gilbert* and *Merrigan* is misplaced. All three cases deal with the statute of limitation in the context

of medical malpractice. This case involved the finality of a judicial determination. Anderson received her day in court and not every judicial proceeding is adversarial. *In re Dependency of A.W.*, 53 Wn. App. 22, 30, 765 P.2d 307, 312 (1988) (Dependency is a preliminary, remedial, non-adversary proceeding.). *In re Sturgeon*, 242 B.R. 724, 727 (Bankr. E.D. Okla. 1999) (Bankruptcy proceedings are not adversarial.). Unlike the issues in the malpractice cases, Anderson's matter was heard by a judge who made a final determination. Anderson's issue is how long she has to set that determination aside. The Trustees' Accounting Act, RCW 11.106, is a balance struck by the legislature to protect trustees from old claim, as here, while protecting beneficiaries by providing prompt, independent judicial oversight. Anderson does not meet criteria (1) and (3).

No reported Washington Supreme Court decision includes a detailed analysis of the "substantial public interest" criterion of RAP 13.4(b)(4), but this Court weighed what amounts to "public interest" when considering the related question of whether to decide a moot issue:

> When determining the requisite degree of public interest, courts should consider (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for the future guidance of public officers, and (3) 'the likelihood of future recurrence of the question.

In re Mines, 146 Wn.2d 279, 285, 45 P.3d 535 (2002) (internal quotation marks omitted). Where the Court has directly addressed the "substantial public interest" criterion of RAP 13.4(b)(4), it has used these principles. *E.g. State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). This case will not provide a clear answer to a public interest issue because the issue will be clouded by Anderson's failure to actually address these issues properly in the trial court, as discussed, *supra*, and the other dispositive issues discussed *infra*.

B. If this Court accepts review, it should review the other issues raised and argued by Dussault in the Court of Appeals.

1. Dussault raised additional, dispositive issues that must be addressed if review is accepted.

Dussault presented several arguments both to the trial court and to the Court of Appeals that would have resulted in dismissal of Anderson's case. The Court should consider these issues if it accepts review. They include Dussault's lack of duty to Anderson. Dussault was not Anderson's attorney and had no duty toward her. Collateral Estoppel bars Anderson's claim against Dussault because she failed to appeal the dismissal of her mother Andrea Davey. Judicial Estoppel applies because she accepted the benefits of the Trust's management. Perhaps most importantly, no one violated the Trust Agreement.

2. Dussault owed no duty to Anderson.

Anderson's argument that Dussault owed some direct obligation to her ignores important facts that she does not dispute. Dussault set out the firm's participation in this matter, and no one has taken issue with that. CP 345-48. Anderson does not claim anything was wrong with the Trust, only with its administration, and Dussault's participation in its administration was the preparation and presentation of annual reports to which she also ascribed no fault. *Id.* Anderson claims the actions of the TAC in approving payments were not in accord with the Trust. Dussault never represented the TAC. CP 347. Anderson's claims against Dussault have no basis in the record.

> In *Trask v. Butler,* 123 Wash.2d 835, 872 P.2d 1080 (1994), this court expressly adopted a multifactor test to determine whether an attorney may be liable for malpractice to such a nonclient third party. The relevant factors are:
>
> 1. The extent to which the transaction was intended to benefit the plaintiff [that is, the third party suing the attorney];
>
> 2. The foreseeability of harm to the plaintiff;
>
> 3. The degree of certainty that the plaintiff suffered injury;
>
> 4. The closeness of the connection between the defendant's [that is, the attorney's] conduct and the injury;
>
> 5. The policy of preventing future harm; and

> 6. The extent to which the profession would be unduly burdened by a finding of liability.
>
> *Trask*, 123 Wash.2d at 843, 872 P.2d 1080. We explained that the first factor is the "primary inquiry" in determining an attorney's liability to third parties. *Id.* at 842, 872 P.2d 1080. We further explained that "under the modified multi-factor balancing test, the threshold question is whether the plaintiff is an intended beneficiary of the transaction to which the advice pertained" and that "no further inquiry need be made unless such an intent exists." *Id.* at 843, 872 P.2d 1080.

Stewart Title Guar. Co. v. Sterling Sav. Bank, 178 Wn.2d 561, 565-66, 311 P.3d 1, 3 (2013).

Only the first of the six *Trask* criteria is arguably met in this case.[1] Wells Fargo is a corporate trustee and financially capable of addressing any harm it might cause were it to mismanage Anderson's Trust. CP 460, 473. Anderson's allegation is little more than a claim that Dussault should have checked Wells Fargo's work. But the cost of double-checking the work of a professional trustee by the lawyers hired to submit required reports is self-defeating.

Further, a trustee may have very divergent interests from those of the beneficiary; the claim that the trustee's attorney has some duty to the beneficiaries of the trust rarely comes up. Where it has, however, the claim is not sustained.

> "A trustee in the traditional sense has broad discretionary powers over the estate assets and must make difficult investment and distribution decisions. The attorney for the trustee must assist the trustee to make these discretionary decisions." *Leyba v. Whitley*, 120 N.M. 768, 774, 907 P.2d 172, 178 (1995). *In Durham v. Guest*, 142 N.M. 817, 171 P.3d 756 (2007), *overruled on other grounds by Durham v. Guest*, 145 N.M. 694, 204 P.3d 19 (2009), the Supreme Court of New Mexico stated: "[A]n attorney has no duty to the nonclient beneficiary of a client fiduciary, even when the attorney represents the client in the client's role as a fiduciary, if such a duty would significantly impair the performance of the attorney's obligations to his or her client." 142 N.M. at 823, 171 P.3d at 762. In *Leyba v. Whitley*, the Supreme Court of New Mexico recognized that an adversarial relationship can develop between an attorney's client and a third party to whom the attorney's client owes a fiduciary duty. *See* 120 N.M. at 771, 907 P.2d at 175. The Supreme Court of New Mexico stated: "[T]he estate and its beneficiaries are incidental, not intended, beneficiaries of the attorney-personal representative relationship." 120 N.M. at 776, 907 P.2d at 180 (adopting the reasoning of the Supreme Court of Washington in *Trask v. Butler*).

Murphy v. Gorman, 271 F.R.D. 296, 313-14 (D. N.M. 2010). The *Murphy* court relied on *Trask*, which is the standard that New Mexico courts adopted.

Anderson's legal claims rest solely on the opinion she obtained from attorney Gary Colley. "There is little distinction in advising the guardian of the estate of an incapacitated individual and advising the

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[1] Anderson is not the sole beneficiary of this Trust: Others may be beneficiaries, including her heirs, the State of Washington, and the United States.

trustee of a trust for an incapacitated individual." CP 140. But there is a very large difference, as *Stewart Title* demonstrates. Anderson will suffer no loss because a corporate trustee such as Wells Fargo can cover damages now and in the future if it errs. A professionally managed trust is unlikely to injure the *cestui que*. There is no connection between the allegedly unauthorized payments and Dussault's preparation of annual reports after the fact. Further, creating additional duties to third parties would unduly and unnecessarily burden the legal profession in situations where attorneys such as Dussault are hired to perform discrete services for their clients.

3. Judicial Estoppel barred Anderson's claims

Anderson has accepted the benefits of the Trust distributions and now wishes to complain of these benefits. Her position is clearly opposed to that taken during the Trust administration and is barred by judicial estoppel. Washington recognized this doctrine. *Garrett v. Morgan*, 127 Wn. App. 375, 112 P.3d 531 (2002). A number of courts have applied the doctrine to situations such as this where a ward or beneficiary claims mismanagement of a trust or settlement after accepting the benefits of the previous proceedings. "[M]inors having received the benefit of the sale are estopped to deny the judicial statements and admissions of their duly

authorized legal representatives, who acted in good faith." *Jackson v. United Gas Public Service Co.*, 196 La. 1, 29, 198 So. 633, 642 (1940). In *McKay v. Owens*, 130 Idaho 148, 937 P.2d 1222 (1997), the court bound a guardian to her prior statements that a settlement over a medical malpractice claim brought for her ward was adequate. The court was so unimpressed with the change in position that it awarded the defendants terms under CR 11.

4. Collateral estoppel bars Anderson's claims against Dussault because she had failed to appeal the dismissal of Davey from the action.

Anderson must demonstrate that she preserved her issues in the trial court, but a "successful litigant need not cross-appeal in order to urge any additional reasons in support of the judgment, even though rejected by the trial court." *Peterson v. Hagan*, 56 Wn.2d 48, 52, 351 P.2d 127 (1960). Because Anderson has not appealed Davey's dismissal, Anderson cannot receive effective relief. CP 14-19, 510-12. There is no controversy. "This court has uniformly held that it will not consider or decide cases when no controversy longer exists." *Sayles v. City of Seattle*, 119 Wash. 12, 13, 204 Pac. 778 (1922).

Late in the case, Anderson began to accuse Davey of misappropriating funds. CP 56-62. Davey was on the TAC when it

approved the payments of which Anderson now complains. If anyone is liable for some wrongdoing, it is Davey, but Davey has been dismissed, judgment rendered in her favor and no claim of error has been raised against her dismissal. Anderson's claims against the other defendants are thus barred by collateral estoppel as to every relevant issue in this matter. Anderson's Complaint lumps all the defendants together as having wronged her. CP 473-74. If there is no claim as a matter of law against Davey, there cannot be a claim against the other defendants.

In *Cunningham v. State, 61 Wn. App. 562, 564, 811 P.2d 225* (1991); a motorist seriously injured in an automobile accident sued his attorneys for failing to file a tort claim with the Federal Government. The superior court granted summary judgment in favor of the attorneys because the prior partial summary judgment order in federal court was entitled to collateral estoppel effect, and the court had held that inadequate striping and lighting of the military base gate where the collision occurred was not a proximate cause of motorist's injuries. Thus, the failure of the attorneys to file a claim was not material. *Cf. Fite v. Lee*, 11 Wn. App. 21, 521 P.2d 964 (1974).

The application of collateral estoppel here leaves Davey dismissed on the merits, no appeal taken from her dismissal,[2] and no error assigned to her dismissal. Consequently, as an alternative basis for sustaining the trial court's decision, collateral estoppel bars Anderson's action. The record is sufficiently developed to permit review of this issue. *Peterson*, 56 Wn.2d at 52.

C. Dussault was properly awarded reasonable attorney's fees by the Court of Appeals and should be awarded reasonable attorney fees and costs on appeal under RCW 11.96A.150 and in equity.

For reasons never explained, Anderson attempted to paint Dussault as the Simon Legree of this action even though his duties were unconnected with the decisions that the TAC made and with which Anderson now takes umbrage.[3] Assuming the expenditures were inappropriate, what action might Dussault have taken to squeeze this toothpaste back into the tube? Could he file suit to force Lancaster to sell immediately, probably at a loss, and perhaps putting Anderson and her mother on the street? Should he have repossessed the Mercury Tracer

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[2] Anderson appealed the court's Order, not the final judgment. CP 14-19.

[3] *E.g.* In response to Carl Gay's letters, Mr. Dussault did not rectify the issues raised but, instead, the defendants "circled the wagons" and arranged for the sealing of the court file so neither Carl Gay nor Rachel nor anyone else could access the record. . . . Although Mr. Dussault took prompt action to lock-up the court file and promised to resolve the inappropriate use of $33,000 of Rachel's trust fund to purchase real property in the name

stranding Anderson and her mother on the Voice of America nine miles from town? Would it have been to Anderson's benefit to pry the cost of the computer out of Davey probably prying the food out of Anderson's mouth in the process?

Anderson has not carefully thought out her assertions against the defendants and especially Dussault. Her knee jerk appeal against Dussault lacked merit, as the Court of Appeals noted.

> Dussault and Wells Fargo both request reasonable costs and attorney fees pursuant to RAP 18.1 and the Washington Trust and Estate Dispute Resolution Act ("TEDRA"), ch. 11.96A RCW. TEDRA provides,
>
> > Either the superior court or any court on appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings ... to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.
>
> RCW 11.96A.150(1).
>
> ¶ 29 As Anderson's claims against Dussault and Wells Fargo lack merit, we grant their request for costs and attorney fees in an amount to be determined by our commissioner. RAP 18.1(f).

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of Andrea's boyfriend, it was not until five years later that those funds were actually recovered and restored to the trust. CP 88

Anderson, 310 P.3d at 862. The same applies to this case. Dussault did nothing improper. He performed the duties he was employed to do. If the claims against him are not wholly frivolous, they are without merit. An attorney should be permitted to represent his client without the fear of being dragged into litigation that is propelled by nothing but avarice.

V. CONCLUSION

The Court should decline to accept review. Anderson meets none of the criteria for the acceptance of review, has not preserved her issues for review and her case lacks any substantive merit.

Respectfully submitted this 24th day of January 2014.

LEE SMART, P.S., INC.

By: _____
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By: _____
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Of Attorneys for Respondents Dussault

DECLARATION OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on the date indicated below, I caused service of true and correct copies of ***Answer to Petition for Review*** in the manner indicated below to:

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DATED this 24th day of January, at Seattle, Washington.

Wendy A. Larson, Legal Assistant

OFFICE RECEPTIONIST, CLERK

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Subject: Anderson v. Dussault; et al.
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Cause No. 89788-3. Attached please find Respondent Dussault's Answer to Petition for Review for filing with the Supreme Court. Thank you.

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