No. 89788-3

SUPREME COURT
OF THE STATE OF WASHINGTON

RACHEL MARGUERITE ANDERSON (formerly RACHEL M. RODGERS), an individual,

Petitioner,

vs.

WILLIAM L.E. DUSSAULT, et al.,

Respondents.

REPLY TO ISSUES RAISED IN ANSWER TO PETITION FOR REVIEW (RAP 13.4(d))

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I. INTRODUCTION

This reply is submitted pursuant to RAP 13.4(d) to address the new issues raised in the respondents' answers to the petition for review. This Court should grant review of the issues raised by petitioner Rachel Anderson and deny review of the additional issues raised in respondents' answers.

II. ARGUMENT IN SUPPORT OF DENYING REVIEW OF ADDITIONAL ISSUES RAISED BY RESPONDENTS.

In her petition for review, Rachel asks this Court to review whether judicial approval of a trust accounting under the Trustees' Accounting Act (TAA), RCW ch. 11.106, bars a minor beneficiary's claims for breach of fiduciary duty even when the minor had no guardian ad litem to protect her interests, as required by RCW 11.106.060. Contrary to Dussault and McMenamin's assertion (Dussault Answer 4-7; McMenamin Answer 11-12), Rachel raised this issue in the trial court. (CP 89-90 ("RCW 11.106.080 does not apply to Rachel because no GAL or other representative was appointed.")) Rachel's argument is not "new" simply because she cites additional authority in her petition. *Brutsche v. City of Kent*, 164 Wn.2d 664, 671 n.3, ¶ 13, 193 P.3d 110 (2008) ("parties can

clearly cite additional authority on appeal in support of issues they have already raised").

In their answers, respondents ask this Court to consider additional issues that they argue would bar Rachel's claims based on conduct she could not challenge as a minor without a guardian ad litem. Respondents fail to address any of the criteria in RAP 13.4(b) in their request for review of these issues, and their additional issues are in any event meritless.

A. The fact that a co-fiduciary was complicit in their breaches of fiduciary duty does not immunize respondents from Rachel's claims.

The Trust's exculpatory provision purporting to immunize respondents for their breaches of fiduciary duty because Rachel's mother did not object to trust accountings that approved her own misuse of trust funds has no more effect than the similar provision in RCW 11.106.080, which would apply only if Rachel had been protected by a guardian ad litem. Respondents are not immunized against Rachel's claims simply because their co-fiduciary did not "object" to accountings that approved her own misfeasance.

Exculpatory provisions in a trust are strictly construed. Restatement (Second) of Trusts § 222(2) and comment a; *see also* 4 Austin Scott, et al., *Scott and Ascher on Trusts* § 24.27.2, pg. 1804

(5th Ed. 2007). Wells Fargo and McMenamin rely upon the Trust's provision that "a parent['s] . . . failure . . . to object to an account statement within 30 days . . . shall operate as a full discharge of the Trustee by the beneficiary as to all transactions set forth in such annual statement." (Wells Fargo Answer 11; McMenamin Answer 13-14; CP 111) According to Wells Fargo and McMenamin, this provision bars Rachel's claims for breach of fiduciary duty while she was a minor because her mother failed to object to trust accountings "approving" her own misfeasance. But under the terms of the Trust or the TAA, Rachel cannot be bound by actions she could not challenge without a guardian ad litem, and thus the Trust's exculpatory provision does not bar Rachel's claims.

Because Rachel was never appointed a guardian ad litem, she had no way of challenging Ms. Davey's failure to object to Wells Fargo's accountings that consistently approved Ms. Davey's use of trust funds for her own benefit rather than Rachel's. RCW 4.08.050 ("when an infant is a party he or she shall appear by

guardian....").[1] It would be unconscionable to hold that Rachel's claims against respondents are barred because their co-fiduciary Ms. Davey did not "object" to accountings *detailing Ms. Davey's own misfeasance.* The Trust itself recognizes that such a conflict of interest is impermissible, and thus prohibited Ms. Davey from any decision-making regarding trust expenditures where she stood to benefit from the expenditure. (CP 111)

Respondent Wells Fargo remained silent as Ms. Davey rubber-stamped its accountings, knowing that with each accounting it "earned" additional fees and purportedly immunized itself against any breach of its fiduciary duties. But as this Court has long recognized, Wells Fargo cannot rely on its own lack of oversight to immunize itself against Rachel's claims. *Hensen v. Peter*, 95 Wash. 628, 637, 164 P. 512 (1917) (recognizing "equitable principle that a party will not be permitted to avail himself of an unconscientious advantage obtained by his own wrongful act").

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[1] Respondent McMenamin argues in addition that *all* of Rachel's claims are barred because Rachel did not object to the single accounting she received after she became an adult. (McMenamin Answer 14) However, that accounting covers only transactions between September 1, 2007, and August 31, 2009, and Rachel has not asserted any claims based on expenditures of her trust after she became an adult. (CP 91)

Rachel cannot be denied her day in court through no "fault" of her own but her age. *See Schroeder v. Weighall*, 316 P.3d 482, 489 (Wash. 2014) (statute that eliminated tolling of minors' medical malpractice claims was unconstitutional because it "place[d] a disproportionate burden on the child whose parent or guardian lacks the knowledge or incentive to pursue a claim on his or her behalf.... It goes without saying that these groups of children are not accountable for their status."). The TAA requires judicial oversight – including appointment of a guardian ad litem to formally protect a minor beneficiary's rights – precisely because the Legislature recognized it would be patently unjust to bar a minor's claims based on an accounting that she had no ability to challenge, and the language of the Trust cannot immunize respondents.

B. Rachel cannot be judicially estopped from asserting claims for breach of fiduciary duty based on her "acceptance of benefits" while a minor.

Respondent Dussault argues that Rachel's claims should be barred based on conduct for which she cannot be legally responsible, arguing that Rachel's "acceptance of benefits" from the trust while a minor estops her from asserting any breach of fiduciary duty claims. (Dussault Answer 13-14) The law governing judicial estoppel does not support his argument.

"Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, ¶ 7, 160 P.3d 13 (2007). "The doctrine seeks to preserve respect for judicial proceedings, and to avoid inconsistency, duplicity, and waste of time." *Arkison*, 160 Wn.2d at 538, ¶ 7 (quotation omitted). A court weighs three factors when deciding whether to judicially estop a party: "(1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Arkison*, 160 Wn.2d at 538-39, ¶ 8 (quotation omitted).

Here, judicial estoppel cannot apply because it requires a party to have asserted an inconsistent position in a prior court proceeding. *Arkison*, 160 Wn.2d at 538-39, ¶¶ 7-8. Rachel never had the opportunity to take *any* position in a prior court proceeding, because respondents did not comply with RCW

11.106.060's requirement that Rachel be appointed a guardian ad litem. Moreover, without a guardian ad litem, Rachel was in no position to "reject" or otherwise challenge the trust distributions that Wells Fargo paid directly to Ms. Davey without scrutiny or oversight.

Dussault cites no authority to support his novel argument that a minor beneficiary, unrepresented by a guardian ad litem, waives any claim for breach of fiduciary duty if she benefits from a trust while still a minor. In *Jackson v. United Gas Pub. Serv. Co.*, 196 La. 1, 29, 198 So. 633, 642, *cert. denied*, 311 U.S. 686 (1940) (Dussault Answer 13-14), for instance, the court affirmed the sale of minors' interest in real property because "their duly authorized legal representatives, who acted in good faith" approved the sale. Here, Rachel had no "duly authorized legal representative," as required by RCW 11.106.060. Likewise, in *McKay v. Owens*, 130 Idaho 148, 937 P.2d 1222 (1997) (Dussault Answer 14), the court bound a parent, not a minor, to her statement in a previous judicial proceeding that the settlement of her minor son's medical malpractice suit was adequate. Moreover, in *McKay*, unlike here, the minor son's interests were protected by two attorneys and a

guardian ad litem when the settlement was reached.[2] Dussault's judicial estoppel argument does not support the dismissal of Rachel's claims.

C. Neither res judicata nor collateral estoppel bars Rachel's claims because there was no prior adjudication resolving her claims.

Respondents next seek to preclude any adjudication on the merits by arguing res judicata and collateral estoppel bar Rachel's claims because she did not assign error to the trial court's summary judgment dismissal of her claims against Ms. Davey. (Wells Fargo Answer 11-12; Dussault Answer 14-16) Respondents again ignore that these doctrines cannot apply because as an unrepresented minor Rachel never had a prior opportunity to litigate her claims.

Res judicata and collateral estoppel are preclusion doctrines that seek to avoid duplicative litigation. *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 737, ¶ 32, 222 P.3d 791 (2009); Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805 (1985). For either doctrine to apply, there must have been a prior adjudication involving the same

[2] Dussault also cites *Garrett v. Morgan*, 127 Wn. App. 375, 112 P.3d 531 (2005), which was expressly overruled by this Court in *Arkison*, 160 Wn.2d at 541, ¶ 13. *Garrett* did not involve a minor and held that the plaintiffs' intentional failure to disclose a personal injury lawsuit in their bankruptcy justified barring the lawsuit based on judicial estoppel.

claim (res judicata), or the same issue (collateral estoppel). *Gold Star Resorts*, 167 Wn.2d at 737-38, ¶ 32; Trautman, *supra*, 60 Wash. L. Rev. at 812, 831-32 (for res judicata to apply "there must be substantial identity in the *successive proceedings*"; "for collateral estoppel to apply, the issue decided in the *prior adjudication* must be identical with the one presented in the immediate action") (emphasis added). Neither res judicata nor collateral estoppel bars Rachel's claims because both doctrines apply only where a party seeks to relitigate a claim or issue resolved in a prior adjudication. The summary judgment order relied on by respondents was not entered in a prior suit; it was entered in this suit. Rachel never had a prior adjudication of her claims because respondents failed to have a guardian ad litem appointed as required by RCW 11.106.060.

The cases cited by respondents underscore that neither res judicata nor collateral estoppel bars Rachel's claims. *Ensley v. Pitcher*, 152 Wn. App. 891, 899, ¶ 11, 222 P.3d 99 (2009) ("The threshold requirement of res judicata is a valid and final judgment on the merits *in a prior suit.*"; res judicata barred plaintiff's claims against bartender because separate court had entered summary judgment dismissing plaintiff's identical claims against bartender's

employer) (emphasis added) (Wells Fargo Answer 12), *rev. denied*, 168 Wn.2d 1028 (2010); *Cunningham v. State*, 61 Wn. App. 562, 569, 811 P.2d 225 (1991) (collateral estoppel applied because plaintiff "fully and vigorously litigated the discretionary function exception issue *in the first proceeding*") (emphasis added) (Wells Fargo Answer 12; Dussault Answer 15).[3]

In any event, respondents cite no authority for the novel proposition that not appealing the dismissal of claims against one tortfeasor waives review of any claims against remaining tortfeasors. (*See also* Reply Brief 32 as to the consequence of reversal) Whether before trial or on appeal, plaintiffs can, and regularly do, release tortfeasors without compromising their claims against the remaining tortfeasors. *See, e.g., Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 708, 732 P.2d 974 (1987) (beneficiary settled with co-trustee without compromising her claims against the remaining trustee); *see also* RCW 4.22.060(2). Respondents' theory of appellate review would require appellants to waste both the court's and parties' resources

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[3] *Fite v. Lee*, 11 Wn. App. 21, 26-29, 521 P.2d 964, *rev. denied*, 84 Wn.2d 1005 (1974), also cited by respondents, refers generally to "res judicata," but in fact addressed whether a plaintiff's release of a principal also released the principal's agents.

by appealing against every defendant or risk "waiving" claims against the remaining defendants. RAP 2.4(a) ("The appellate court will, at the instance of the appellant, review the decision *or parts of the decision designated in the notice of appeal* . . . .") (emphasis added).

D. Whether respondents breached their fiduciary duties to Rachel was a genuine issue of material fact that could not have been resolved on the disputed summary judgment record.

Respondents misrepresent their duties and their actions in arguing that the summary judgment record establishes *as a matter of law* that they did not breach any fiduciary duty they owed Rachel. This Court should reject respondents' argument that there is no genuine issue of fact whether they breached the fiduciary duties they owed Rachel.

"[T]rustees, as fiduciaries, owe to the beneficiaries the highest degree of good faith, care, loyalty and integrity." *Esmieu v. Schrag*, 88 Wn.2d 490, 498, 563 P.2d 203 (1977). Where a beneficiary alleges that a trustee has breached its fiduciary duty "[t]he burden of proof is on the fiduciary to demonstrate no breach of loyalty has been committed." *Wilkins v. Lasater*, 46 Wn. App. 766, 777-78, 733 P.2d 221 (1987) (reversing judgment in favor of

trustee because his "self-serving testimony is insufficient to meet what we view is the increased burden of proof he bears as a fiduciary") (citing *Hetrick v. Smith,* 67 Wash. 664, 667-68, 122 P. 363 (1912)). Whether a party has breached a fiduciary duty is generally a question of fact inappropriate for resolution on summary judgment. *Valentine v. Dep't of Licensing*, 77 Wn. App. 838, 846, 894 P.2d 1352, *rev. denied*, 127 Wn.2d 1020 (1995); *In re Washington Builders Ben. Trust*, 173 Wn. App. 34, 77-78, ¶ 77, 293 P.3d 1206, *rev. denied,* 177 Wn.2d 1018 (2013).

McMenamin concedes he owed Rachel a fiduciary duty as a member of the Trust Advisory Committee, which bore responsibility for ensuring that trust disbursements were consistent with the Trust's purpose of providing Rachel medical care and "promot[ing] her happiness, welfare, and development." (McMenamin Answer 14-15; CP 99-100, 106, 111-12) Wells Fargo undisputedly owed Rachel a fiduciary duty as trustee of her trust. (CP 94) Wells Fargo's argument that its duties were "limited to financial management and investment of the Trust estate" and that it had "no authority to supervise Ms. Dav[e]y's actions" (Wells Fargo Answer at 12 n.6, 14) ignores important provisions in the Trust, which required Wells Fargo to approve any trust expenditure

that "would bring direct benefit to a Trust Advisory Committee member" or that would "indirectly benefit a Committee member," including Ms. Davey. (CP 111-12) The Trust also required Wells Fargo to manage the purchase of any real estate and ensure that "[t]itle to or ownership of such [real estate] shall be maintained by the Trust." (CP 110)

Wells Fargo engaged Dussault as its attorney to prepare accountings for Rachel's trust. Thus, contrary to his protestations (Dussault Answer 10-13), Dussault also owed Rachel a fiduciary duty. Restatement (Third) of The Law Governing Lawyers § 51 (2000) ("a lawyer owes a duty to use care . . . to a nonclient when . . . the lawyer's client is a trustee . . . ."); *see also* CP 140-41. Dussault's reliance on *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994), is especially misplaced. (Dussault Answer 10-12) In *Trask*, this Court reasoned that a personal representative's attorney did not owe the estate's beneficiaries a fiduciary duty because the estate beneficiaries were not "intended beneficiaries" of the attorney-personal representative relationship, and because the beneficiaries were empowered to "take a proactive role in estate matters." 123 Wn.2d at 844-45. Here, by contrast, Rachel is the intended beneficiary of Dussault's engagement by Wells Fargo –

she is the *only* beneficiary.[4] Moreover, unlike *Trask*, Rachel had no ability to take a role in the management of her trust because respondents failed to have a guardian ad litem appointed to formally protect her interests.

Rachel submitted ample evidence that Wells Fargo and McMenamin breached their fiduciary duties by repeatedly approving distributions to Ms. Davey for her personal benefit, not Rachel's (CP 58-62, 68-71, 116-21, 126-33, 135-36), despite Ms. Davey's obvious conflict of interest, their duty under the Trust to independently scrutinize any distribution that directly or indirectly benefited Ms. Davey (CP 111-12), and without obtaining even basic documentation to verify Ms. Davey's expenditures. (CP 58-60, 62, 90, 131, 135-36) Wells Fargo continued to simply give Ms. Davey trust funds even after it knew Rachel no longer lived with her. (CP 60) When McMenamin was finally confronted with his co-fiduciary's ongoing misuse of trust funds, he chose to resign rather than address the issue. (Op. ¶ 9; CP 288) Wells Fargo compounded

[4] Dussault's assertion that Rachel is not the sole beneficiary of the Trust because her estate might escheat is beyond the pale. (Dussault Answer at 12 n.1) The Trust is entitled "Trust Agreement For The Rachel Marguerite Rodgers Trust" and explicitly states that it is "for the benefit of RACHEL MARGUERITE RODGERS." (CP 94 (emphasis in original)). The Trust repeatedly refers to "the beneficiary," not "a beneficiary." (CP 94-114)

its complicity with Ms. Davey's misfeasance by submitting accountings – prepared by Dussault – that rubber-stamped Ms. Davey's repeated misuse of trust funds. (CP 68-71, 126-32, 349-53, 355-58, 368-73, 377-82, 385-90, 393-400, 411-19) Wells Fargo also failed to manage the Trust's ownership interest in a residence and ensure that it was titled in the Trust's name. (CP 61, 110, 129-31)

Wells Fargo's argument that it did not breach its "limited" duties also ignores that it had sole responsibility for "all of the duties of the TAC," including verifying that all trust distributions were consistent with the terms of the Trust, after the Trust Advisory Committee was dissolved in 2003. (Op ¶ 10; CP 375) Rachel submitted evidence that Wells Fargo repeatedly approved expenditures that violated the terms of the Trust after 2003. (CP 59-60, 62, 128-33)

Dussault asserts he did not breach any duty because he simply rehashed Wells Fargo's reports when creating and submitting the Trust accountings. (Dussault Answer at 11) To the contrary, that is *precisely why* Dussault breached his fiduciary duties. Had he or Wells Fargo actually bothered to review the expenditures set forth in the accountings they now claim bar Rachel's claims, the misuse of Rachel's trust would have been

discovered long before the Trust was drained of a substantial portion of its value. Dussault's concession that he did not independently review the accountings underscores the injustice in holding that these admittedly unverified and unsubstantiated accountings bar Rachel's claims despite the fact that she had no guardian ad litem charged with verifying their accuracy.

E. Wells Fargo and Dussault are not entitled to their fees in this Court.

In their request for fees, neither Wells Fargo nor Dussault cite any authority supporting the imposition of attorney's fees on the sole beneficiary of a trust who brings claims raising "legitimate concerns" in "good faith," as the trial court found Rachel did here. As Rachel established in her petition, there is no such authority. (Petition 15-19) This Court should deny respondents' request for fees.

Respondents rely almost entirely on the Court of Appeals' unexplained conclusion that Rachel's claims "lack merit" to support their request for fees. (Op ¶ 29; Wells Fargo Answer at 16; Dussault Answer at 17) As set forth in Rachel's petition, her claims do not lack merit, but are based on respondents' failure to comply with the requirement in RCW 11.106.060 that Rachel "shall" be appointed a

guardian ad litem before her claims can be barred based on trust accountings during her minority. Moreover, Rachel's focus of her petition on the respondents' failure to comply with RCW 11.106.060 is in no way an "admission" that her other arguments "lacked merit." (Wells Fargo Answer 17)

Wells Fargo concedes that imposing attorney's fees on beneficiaries will "temper" the incentive to protect their interests, but argues that "beneficiaries have such a strong incentive to protect their interests that their desire to do so has the potential to offend good faith and existing law." (Wells Fargo Answer at 16) Wells Fargo cites no such "existing law" and provides no explanation how Rachel's claims "offended good faith" – a conclusion with which the trial court expressly disagreed. Rachel did cite "existing law," which *encourages* beneficiaries to protect their interests. *Estate of Eichler*, 102 Wash. 497, 500-01, 173 P. 435 (1918) ("[T]o penalize appellant for daring to ask an adjudication upon a subject-matter that in right and conscience is probably her own would be to do a great wrong, and tend to discourage the assertion of legitimate claims.") (Petition 16-19).

III. CONCLUSION

This Court should grant review of the issues raised in Rachel's petition and deny review of the issues raised in respondents' answers.

Dated this 11th day of February, 2014.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 11, 2014, I arranged for service of the foregoing Reply to Issues Raised in Answer to Petition for Review (RAP 13.4(d)), to the court and to the parties to this action as follows:

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Attached for filing in pdf format is the Reply to Issues Raised in Answer to Petition for Review, in *Anderson v. Dussault*, Cause No. 89788-3.

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