NO. 43280-3-II

COURT OF APPEALS 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.

BRIEF OF RESPONDENTS DUSSAULT

Sam B. Franklin, WSBA No. 1903
William L. Cameron, WSBA No. 5108
Of Attorneys for Respondents Dussault

LEE SMART, P.S., INC.
1800 One Convention Place
701 Pike Street
Seattle, WA 98101-3929
(206) 624-7990

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Washington Cases

Federal Cases

Other Cases

Statutes

Rules

Other Authorities

I. INTRODUCTION

Defendants/Respondents William L. E. Dussault; Barbara J. Byram; Yevgeny Jack Berner; William L. E. Dussault, PS; and the Dussault Law Group (collectively "Dussault") were originally employed to draft a Special Needs Trust Agreement ("Trust") for Plaintiff/Appellant Rachel Anderson, formerly known as Rachel Marguerite Rogers ("Ms. Anderson"), and later employed by Wells Fargo Bank to prepare annual reports and submit them for approval.

The limited scope of this work does not create a duty of care to Ms. Anderson relating to decisions that Wells Fargo or the other trustees made in the course of administering her Trust. Ms. Anderson ignores Dussault's actual role in preparing annual reports and argues that they nevertheless had a general duty of care in matters that Dussault was not involved, either as a decision maker or legal advisor. The undisputed facts show that Dussault had a very limited role and did not provide improper legal advice to Ms. Anderson or anyone else.

Ms. Anderson has now abandoned her claim that Dussault breached a fiduciary duty to her, but continues to claim that Dussault's actions fell below the standard of care to her. In her opening brief, she does not address the several issues and defenses relating to the finality of

the court's approval of the annual reports, so these issues and defenses form an independent basis for this court's affirming the trial court.

II. ISSUES PRESENTED FOR REVIEW

Assignment of Error

Dussault assigns no error to the trial court's proper decision to grant summary judgment of dismissal in favor of Dussault.

Issues Pertaining to Assignments of Error

Dussault disagrees with Ms. Anderson's statement of issues. Dussault believes that this appeal presents two issues, which are more properly stated as follows:

1. Whether the trial court did not err in granting summary judgment of dismissal for Dussault, where:

(1) Dussault represented corporate trustee Wells Fargo Bank solely in the capacity of preparing and presenting annual reports to the superior court, and had no duty to non-client Ms. Anderson;

(2) under Washington's Trustee's Accounting Act, Chapter 11.106 RCW, the Clallam County Superior Court's approval of Dussault's annual reports bars Ms. Anderson from claiming errors in the administration of her Trust many years later;

(3) Collateral estoppel bars Ms. Anderson's claims against Dussault because she had failed to appeal the dismissal of her mother Andrea Davey, formerly known as Andrea Rodgers ("Ms. Davey");

(4) Ms. Anderson should be judicially estopped from arguing that the Trust was mismanaged after accepting the benefits of the Trust's management for so long;

(5) Res judicata bars any argument that the Trust was mismanaged because Ms. Anderson brought causes of action identical to those that her grandmother and father unsuccessfully raised in the trust proceedings; and

(6) Neither Dussault nor any other defendant violated the terms of the Trust, which permitted purchases for transportation, computers, and real property.

2. Whether this court should award Dussault their reasonable attorney fees and costs on appeal.

III. STATEMENT OF THE CASE

A. A Special Needs Trust was created for Ms. Anderson.

Ms. Anderson was born on July 25, 1990. When she was six years old, she was kicked in the face by a horse and sustained major injuries.

An independent proceeding was brought to approve a $300,000 minor settlement in Clallam County Superior Court Cause No. 97-4-203-6. CP 476-96. Richard McMenamin, Ms. Anderson's attorney at the time, and his firm (collectively "McMenamin") hired Dussault to prepare a trust for her. This work was done in 1997, and McMenamin was billed for these services. CP 345. The Trust was funded with two separate installments totaling $187,160.66. CP 497, 504.

The Trust's stated purpose was to provide a system for handling and managing these funds for Ms. Anderson's benefit and to ensure that she would still be eligible for government and private funding that might be available to her based on her injuries and disability. CP 476-78. Under the Trust, "transportation" is a reimbursable expense:

> Nothing herein shall preclude the Trust Advisory Committee from purchasing those services and items which promote the beneficiary's happiness, welfare and development, including but not limited to vacation and recreation trips away from places of residence, expenses for a traveling companion if requested or necessary, entertainment expenses, and transportation costs.

CP 482. In addition, section II (b) of the Trust provides:

> (b) The Trust Advisory Committee shall have absolute and unfettered discretion to determine when and if RACHEL needs regular and extra supportive services as referred to in the paragraph above. The Trust Advisory Committee may direct the Trustee to make or withhold payment at any time and in any amount: as the Trust Advisory Committee

> deems appropriate in the exercise of its discretion. The exercise by the Trust Advisory Committee of its discretion shall be conclusive and binding upon all persons. This Trust is explicitly intended to be a discretionary Trust and not a basic support trust.

Id.

Wells Fargo Bank acted as the financial trustee. CP 473, 476. Mr. McMenamin and her mother Andrea Davey, formerly known as Andrea Rodgers ("Ms. Davey"), were appointed as the Trust Advisory Committee (the "TAC"). CP 472, 476. Wells Fargo employed Dussault. CP 471-72.

B. Dussault was employed to prepare periodic reports.

In late 1999, Wells Fargo employed Dussault to prepare annual or semi-annual reports. CP 346, 473. Dussault worked only for Wells Fargo and had no other involvement in the Trust's management. CP 346-48. Clallam County Superior Court Judge Ken Williams approved each annual or semi-annual report, and these reports addressed every item in Ms. Anderson's complaint. CP 349-59, 368-424.

C. Ms. Anderson's next friends contested the 2002-2003 report.

On August 27, 2001, Ms. Anderson's current attorney Carl Gay wrote to the TAC and Wells Fargo on behalf of Ms. Anderson's father and maternal grandmother complaining of a number offTrust items. He complained primarily of the purchase of a vehicle and a 31% interest in a

home shared by Joe Lancaster and Ms. Davey, who had been in a meretricious relationship. CP 360-61, 370. The Trust had purchased its real-property interest for $33,000. CP 396-407. Davey and Lancaster's relationship had ended by the time Mr. Gay wrote his letter, and Ms. Anderson and Ms. Davey were living elsewhere. CP 370.

Dussault filed a report and sent Mr. Gay a copy on February 7, 2002. CP 364-65. Gay wrote another letter to Dussault on February 12, 2002, alleging all the matters that are now in Ms. Anderson's complaint. CP 366-67. Consequently, Dussault did not move for approval of the annual report in an attempt to address Mr. Gay's complaints. CP 346-47. In July 2002, Mr. McMenamin resigned from the TAC. CP 347. Dussault presented a two-year report on December 6, 2002. CP 368-73. The report recommended that the court appoint Wells Fargo as sole Trustee and dissolve the TAC. CP 372. Following a lengthy continuance, the matter was heard on July 11, 2003, and Judge Williams approved the two-year report over Mr. Gay's objections. CP 347, 374-76.

D. Dussault continued to prepare periodic reports.

The Lancaster house was sold in 2005, and the Trust received $49,135, a net profit of 26%. CP 396-407. Dussault continued to prepare period reports that were submitted to, and approved by, the Clallam

County Superior Court. CP 347, 377-409. Dussault prepared and submitted a report to the court on December 4, 2009. CP 347, 411-24. That report was approved on December 14, 2009. Ms. Anderson received notice of the order but did not oppose or appeal the court's approval. CP 421-24.

E. Ms. Anderson filed suit.

Three days before her twenty-first birthday, Ms. Anderson filed a lawsuit in Clallam County Superior Court, claiming that the defendants were responsible for damages in the amount of $56,873 plus prejudgment interest by breaching their fiduciary duties to her and committing legal malpractice. CP 470-75. She bases these claims on allegations that Wells Fargo, the TAC, and Dussault were responsible for (1) approving the purchase of a minivan,[1] (2) reimbursing travel expenses, (3) purchasing computers, (4) failing to collect rent for the Trust's interest in the house of $20,000, and (5) making unauthorized payments to Ms. Davey of $1,500. CP 497-504. The superior court approved all of the expenditures mentioned in the Complaint and in contemporaneous annual reports that Wells Fargo submitted through Dussault.

[1] According to Ms Anderson this was really a two-year old Mercury Tracer. CP 58.

F. The trial court properly granted summary judgment of dismissal of Ms. Anderson's Complaint.

On January 3, 2012, Dussault moved for summary judgment of dismissal, arguing he had done little other than prepare reports and those reports were accurate. Dussault also raised various defenses including the superior court's approval of the accounting even in the face of opposition from Ms. Anderson's relatives. CP 345-454. On January 6 and 27, 2012, the other defendants also moved for summary judgment of dismissal. CP 143-168, 169-204. Ms. Anderson filed a response, and the defendants filed reply memoranda in support of their motions. CP 45-142.

On February 24, 2012, the Honorable Jay B. Roof heard oral argument and granted these motions. On February 28, 2012, the court entered its Order on Motion. CP 20-22. On March 28, 2012, Ms. Anderson filed a timely appeal. CP 14-19. Judgment was entered dismissing all the defendants on May 4, 2012. CP 510-13.

G. Ms. Anderson's Statement of the Case is not completely accurate.

Generally, Ms. Anderson correctly recites the facts but includes statements of her own opinion that have no support in the record. For example, she notes that her accounting expert R. Duane Wolfe does not understand why a $4,400 charge in early 2003 appears without detail.

App. Br. at 12 n.7; CP 502. The increased professional fees were the intermeddling of Ms. Anderson's father and grandmother who were represented by Ms. Anderson's current counsel. CP 346-47. In addition, Ms. Anderson characterizes Ms. Davey's purchase of a two-year-old Mercury Tracer blossoms as a "sporty car" and "dream car." App. Br. at 8, 27. Ms. Anderson also complains for the first time that Ms. Davey was misappropriating money, an allegation not found in her Complaint. App. Br. at 27; CP 56-62.

Ms. Anderson correctly describes Dussault's role in this lawsuit: "Wells Fargo, as trustee, hired Dussault (and others in his law firm, collectively 'Dussault') to be the bank's legal counsel for purposes of preparing the annual accounting reports to the court pursuant to The Trust Agreement." App. Br. at 6; *see* CP 346.

IV. SUMMARY OF ARGUMENT

This court should affirm the trial court's decision to dismiss Dussault. Dussault represented Wells Fargo Bank solely in the capacity of preparing and presenting annual reports to the superior court. Dussault had no duty to Ms. Anderson because she was not a client. Under the plain terms of the Trust, there was no mismanagement in trustees purchasing her transportation, a computer, and a real property interest.

Even if Dussault owed a legal duty to Ms. Anderson, collateral estoppel bars her claims because she failed to appeal the dismissal of Ms. Davey. Res judicata also bars any argument that the Trust was mismanaged because Ms. Anderson brought causes of action identical to those that her grandmother and father unsuccessfully raised in the trust proceedings. In addition, under Washington's Trustee's Accounting Act, the Clallam County Superior Court's approval of Dussault's reports prohibits Ms. Anderson from claiming errors in the administration of her Trust many years later. Further, this court should judicially estop Ms. Anderson from arguing that the Trust was mismanaged after she accepted the benefits of that Trust's management for years. Finally, this court should award Dussault their reasonable attorney fees and costs on appeal.

V. ARGUMENT

A. The standard of review here is de novo, and the record supports summary judgment of dismissal as a matter of law.

This court reviews de novo a trial court's order granting summary judgment. *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 350-51, 144 P.3d 276 (2006). Summary judgment is proper if the pleadings, depositions, and other documents show that "there is no genuine issue of material fact and that the moving party is entitled to

judgment as a matter of law." CR 56(c). Factual disputes must be material to survive summary judgment, and a "material fact" is one on which the outcome of the litigation depends. *Morgan v. Kingen*, 166 Wn.2d 526, 533, 210 P.3d 995 (2009). This court construes evidence in the light most favorable to the nonmoving party. *See Pac. Nw. Shooting Park Ass'n*, 158 Wn.2d at 350.

If the moving party shows the absence of a genuine issue of material fact, then the burden shifts to the nonmoving party to set forth specific facts that would raise a genuine issue of material fact for trial. *Id.* at 350-51. If the nonmoving party fails to show an issue of material fact as to any element of a claim, then summary judgment on that claim is appropriate. *Id.* at 351.

B. Ms. Anderson failed to preserve possible arguments below and fails to address others on appeal.

1. Ms. Anderson failed to challenge several of Dussault's arguments at 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, Ms. Anderson did not address several of Dussault's key arguments. CP 30-31.

First, Ms. 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. Ms. Anderson was two years late. CP 448-50. She did not address that defense. CP 30, 83,

Second, Dussault demonstrated that Washington law did not permit the Trust to collect rent from Mr. Lancaster. CP 439. Ms. Anderson made no response. This claim for rent amounts to over $20,000, which is almost half of her damages claim. CP 83-93, 439.

Finally, Ms. Anderson rested below on her bare assertions that expenditures on the vehicle, the computer, and Mr. Lancaster's home were inappropriate. CP 86. Dussault spent considerable time showing that these were authorized expenses and well within the language of the Trust. CP 436-40. Ms. Anderson made no counter arguments and presented no applicable authority. CP 86, 436-40.

2. Ms. Anderson also failed to address several key issues in her opening brief and cannot argue them in her reply.

In her opening brief, Ms. Anderson does not present grounds for reversal on the Trust Accounting Act, res judicata, collateral estoppel, or related issues thoroughly argued and presented by the defendants to the trial court. CP 440-50.

> The plaintiffs belatedly raised the subject in their reply brief. We have held consistently, however, that an appellant may not present contentions or urge in his reply brief any grounds for reversal not clearly pointed out in his original brief.

Dore v. Kinnear, 79 Wn.2d 755, 783, 489 P.2d 898 (1971); *see* RAP 10.3(a)(6); RAP 10.3(c). The defendants thoroughly argued these issues below, but Ms. Anderson does not mention any of them in her opening brief. CP 150-56, 334-40, 440-50. Her failure to address these defenses bars her from arguing these issues in a reply brief.

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

Ms. 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). Dussault now has an additional reason. Because Ms. Anderson has not appealed Ms. Davey's dismissal, Ms. 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 P. 778 (1922).

Late in the case, Ms. Anderson began to accuse Ms. Davey of misappropriating funds. CP 56-62. Ms. Davey was on the TAC when it approved all of the major payments of which Ms. Anderson now complains, and if Ms. Davey has been dismissed and judgment rendered in her favor, Ms. Anderson's claims against the other defendants would be barred by collateral estoppel as to every relevant issue in this matter. Every claim in Ms. 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 Ms. 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, among other people, for failing to file a tort claim with the Federal Government. The superior court granted summary judgment in

favor of the attorneys in the legal-malpractice action 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. "[A] rigorous finality requirement does not implement the purposes of collateral estoppel: to protect prevailing parties from relitigating issues already decided in their favor, and to promote judicial economy." *Id.* at 566.

> For collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.

Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 299, 307, 96 P.3d 957 (2004); *see McDaniels v. Carlson*, 108 Wn.2d 299, 303, 738 P.2d 254 (1987); *Chau v. Seattle*, 60 Wn. App. 115, 119, 802 P.2d 822 (1991).

A similar result was reached in *Fite v. Lee*, 11 Wn. App. 21, 521 P.2d 964 (1974). There, the defendant in a wrongful garnishment

proceeding was dismissed after testifying she had nothing to do with the garnishment and would not have authorized it. Her former attorneys and co-defendants then moved for summary judgment, claiming that if the principal was not liable, they could not be as her agents. *Id.* at 23.

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

D. Dussault owed no duty to Ms. Anderson.

Ms. 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. Ms. 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.* Ms. Anderson

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

claims the actions of the TAC in approving payments were not in accord with the Trust. Dussault never represented the TAC. CP 347. Ms. Anderson's claim against Dussault has no basis in the record.

Whether an individual owes another a legal duty is a legal question. *See, e.g.*, *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 474, 951 P.2d 749 (1998); *Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992). In the context of a probate, the Washington Supreme Court set out the criteria determining whether an attorney owes some duty to a non-client. In *Trask v. Butler*, 123 Wn.2d 835, 844, 872 P.2d 1080 (1994), the Court held that the personal representative, not his attorney, owes the beneficiaries a fiduciary duty to act in the estate's best interest. Where the personal representative's conduct falls below this standard, the estate and beneficiaries may bring an action against him for breach of fiduciary duty. *Id.* at 843; *Hesthagen v. Harby*, 78 Wn.2d 934, 481 P.2d 438 (1971). By directing estate beneficiaries to file suit against the personal representative for breach of fiduciary duty, Washington law properly places the emphasis of estate decision making upon the personal representative. Importantly, this rule does not shield attorneys hired by a personal representative from legal malpractice. If an estate's attorney

negligently advises a personal representative, the attorney may still be liable to the personal representative. *Trask*, 123 Wn.2d at 844.

Only two cases depart from the result in *Trask*, and those involved attorneys who represented guardians who absconded with their ward's money. *See In re Estate of Treadwell*, 115 Wn. App. 238, 243, 61 P.3d 1214 (2003); *In re Guardianship of Karan*, 110 Wn. App. 76, 81-82, 38 P.3d 396 (2002). The attorneys had failed to advise the guardians to post a bond or place the money in a blocked account as required by law.

> In the absence of an express lawyer-client relationship, Washington courts use a multi-factor balancing test set forth in *Trask* to establish whether the lawyer owes the plaintiff a duty of care in a particular transaction, the court must determine:
>
> > 1. The extent to which the transaction was intended to benefit the plaintiff;
> > 2. The foreseeability of harm to the plaintiff;
> > 3. The degree of certainty that the plaintiff suffered injury;
> > 4. The closeness of the connection between the defendant's conduct and the injury;
> > 5. The policy of preventing future harm; and
> > 6. The extent to which the profession would be unduly burdened by a finding of liability.

Karan, 110 Wn. App. at 81-82 (quoting *Trask*, 123 Wn.2d at 843); *see Treadwell*, 115 Wn. App. at 243.

Only the first of the six *Trask* criteria is arguably met in this case.[3] Wells Fargo is a corporate trustee and financially capable of addressing any harm it might cause were it to mismanage Ms. Anderson's Trust. CP 460, 473. Ms. 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

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

> 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.

Other courts are in accord. *See, e.g.*, *Firestone v. Galbreath*, 747 F. Supp. 1556, 1571 (S.D. Ohio 1990), *rev'd in part on other grounds*, 25 F.3d 323 (6th Cir. 1994), *Firestone v. Galbreath.*, 67 Ohio St. 3d 87, 616 N.E.2d 202, 203 (Ohio 1993) (quoting *Simon v. Zipperstein*, 32 Ohio St. 3d 74, 512 N.E.2d 636, 638 (Ohio 1987)) ("It is by now well-established in Ohio that an attorney may not be held liable by third parties as a result of having performed services on behalf of a client, in good faith, unless the third party is in privity with the client for whom the legal services were performed, or unless the attorney acts with malice"); *Saks v. Damon Raike & Co.*, 7 Cal. App. 4th 419, 431, 8 Cal. Rptr. 2d 869 (Cal. Ct. App. 1992) (pursuant to California probate law, beneficiaries' cause of action is against trustee only; no standing for action against trustee's attorney); *In*

re Estate of Brooks, 42 Colo. App. 333, 336-37, 596 P.2d 1220, 1222 (Colo. Ct. App. 1979) (trustee's attorney owes no duty to beneficiary unless involved in active fraud); *Thompson v. Vinson & Elkins*, 859 S.W.2d 617, 621-22, 624 (Tex. App. 1993) (no fiduciary relationship exists between the beneficiary of trust and trustee's attorney); *see also* 2 R. Mallen & J. Smith, *Legal Malpractice* § 26.4 (3d ed. 1989 & Supp. 1993), *cf. Goldberg v. Frye*, 217 Cal. App. 3d 1258, 1269, 266 Cal. Rptr. 483 (Cal. Ct. App. 1990) ("particularly in the case of services rendered for the fiduciary of a decedent's estate, we would apprehend great danger in finding stray duties in favor of beneficiaries"); *Neal v. Baker*, 194 Ill. App. 3d 485, 487, 141 Ill. Dec. 517, 551 N.E.2d 704 (Ill. App. Ct. 1990) (primary purpose of attorney-client relationship was to assist the executor in the proper administration of its duties; no duty to beneficiaries).

Even courts that have not adopted the tests of *Trask* have accepted its rationale as applied in the case of a trustee.

> To hold that an attorney's duty of care runs not only to the fiduciary-client, but also to those to whom the fiduciary's duties run, would be particularly problematic in this context. A trustee's attorney is charged with the task of advising the trustee on issues ranging from the trustee's fiduciary obligations to how to manage conflicts in the beneficiaries' personal objectives. The attorney cannot simultaneously advise the trustee and serve the economic interests of each beneficiary without risking conflicts of interest.

Roberts v. Fearey, 162 Or. App. 546, 555, 986 P.2d 690, 695 (Or. Ct. App. 1999).

Ms. Anderson's claims rest solely on the opinion she obtained from expert Gary Colley, who concluded, "There is little distinction in advising the guardian of the estate of an incapacitated individual and advising the trustee of a trust for an incapacitated individual." CP 140. But there is a very large difference, as the cases cited above demonstrate. Unlike *Karan* and *Treadwell*, which involved impecunious guardians who stole their ward's money because the attorney failed to follow black-letter law, this case involves a financially sound corporate trustee who, at most, is alleged not to have adhered strictly to the terms of the Trust. Ms. Anderson will suffer no loss because a corporate trustee such as Wells Fargo can cover damages now and in the future if it erred; a professionally managed trust is unlikely to injure the *cestui que*; there is no connection between the alleged harm — 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 corporate clients.

E. The Trustee's Accounting Act bars Ms. Anderson's lawsuit.

The Trustee's Accounting Act, Chapter 11.106 RCW, provides specific procedures for a trustee to avoid liability for decisions made during the administration of a trust. Under that statute, the trustee must submit routine reports to the court for approval and when the court approves the report, the decree is final and binding on all, including those who are incapacitated or otherwise not *sui juris*. RCW 11.106.060-.080. Annually, the Trustee made reports and annually, the superior court approved those reports.

The history of trusts and trust accounting is peppered with a multitude of problems posed by opportunists such as Ms. Anderson and dishonest trustees. Trustees and their attorneys often had to justify actions that may have happened years before and under vastly different circumstances. Until a final accounting was approved, a trustee was not protected by interlocutory orders approving his reports. In *In re Peterson*, 12 Wn.2d 686, 123 P.2d 733 (1942), the Washington Supreme Court held that ex parte applications for fees in an estate were not final and binding and would be reviewed at final accounting. There, the personal representative and his attorneys bilked the estate of substantial assets over the course of a decade and a half, and when final accounting came, they

were surcharged for those losses. The Trust Accounting Act provides that, as to trusts, the court must scrutinize accounts after due notice to affected parties. This precludes the dual injustices represented by *Peterson*.[4] The trustee is held to account for his conduct routinely, and in return he receives final approval that is not subject to later attack. This is in harmony with notions of finality in judicial proceedings.

All of the limitations that may arguably apply to this action bar Ms. Anderson's claims. As discussed above, the Trustee's Accounting Act bars any relief over trust decisions once approved by the court. Because the statute clearly provides that the decree "shall be deemed final, conclusive, and binding upon all the parties interested including all incompetent, unborn, and unascertained beneficiaries," it precludes her from contesting the court's prior determination. RCW 11.106.080. The court's periodic decrees are conclusive because neither she nor any other interested party appealed them.

> But the decrees were not just "final, conclusive, and binding" as to the propriety of Pemberton's actions and disposition of trust funds. They were also "final, conclusive, and binding" as to any surcharge for losses

[4] *In re Cooper's Estate*, 39 Wn.2d 407, 235 P.2d 469 (1951), is contemporary to *In re Peterson* and comes to a much different result. But like this case, *In re Cooper* involved a formal trust. Even though this brief refers interchangeably to trusts, estates, and guardianships, which all fall under Title 11 RCW, there is a clear statutory difference in the way trusts are routinely reported and administered. The finality of periodic reports applies only to trusts.

> caused by Pemberton's negligent or willful breaches of trust. When he failed to appeal, Barovic relinquished his right to recover these losses and the trial court erred when it awarded interest on the reimbursed sums.

Barovic v. Pemberton, 128 Wn. App. 196, 201-02, 114 P.3d 1230 (2005). Negligence or even intentional violations of the trust are not recoverable.

Nor can Ms. Anderson seek equitable relief. This relief must now be claimed under CR 60(b), and, in the case of a minor, must be brought within one year of the minor reaching majority. CR 60(b). This result is consistent with Sections 72 and 74 of the *Restatement (Second) of Judgments*. While minority may preclude the application of a prior adjudication, it will not do so if the "person seeking relief failed to exercise reasonable diligence." *Id.* § 74. CR 60 establishes "reasonable diligence" as one year.

Ms. Anderson has not, however, pled fraud; nor is it suggested by the Complaint. CR 9(b). Certainly she was aware of the expenses made on her behalf, and they were a matter of record with the Clallam County Superior Court.

> In order to excuse a want of knowledge of the fraud, a pleading must set forth what were the impediments to an earlier prosecution of the claim, how the pleader came to be so long ignorant of his rights, the means if any used by the opposing party fraudulently to keep him in ignorance, or how and when he first obtained knowledge of the matter alleged in the pleading.

Noyes v. Parsons, 104 Wn. 594, 601-02, 177 P. 651 (1919).

Ms. Anderson cannot claim she is entitled to relief under RCW 11.96A.070 (1)(a) because this statute only permits an action if the claim is for breach of a fiduciary duty. She has abandoned her claim for breach of fiduciary duty against Dussault.

In the trial court, the only real defense Ms. Anderson made was to the application of the Trust Accounting Act. She claimed it did not apply to her claim because the Trust was created by the superior court while "not sitting in probate." CP 89. That is incorrect. This is an express trust, approved by the court. Even if it were a trust created by a court, to narrowly construe the words "sitting in probate" to apply only to the probate of estates would defeat many trusts created under Title 11 RCW. It would be doubly odd as the Legislature moved the Act from Title 30 (Banks and Trust Companies) to Title 11, which includes guardianships. The definition of probate jurisdiction usually includes "guardianship and the adoption of minors." Black's Law Dictionary (9th ed. 2009). Washington has long abandoned the separate distinction of a probate court. *Meeker v. Winyer*, 48 Wash. 27, 29, 92 P. 883 (1907).

Ms. Anderson also claimed that because no guardian ad litem ("GAL") was appointed to represent her, the finality of RCW 11.106.080

does not apply to her. For this claim, she relies on RCW 11.106.060, which allows a court to appoint a GAL to file "written objections or exceptions to the account." This is just what Ms. Anderson's father and grandmother could have done in 2003 because RCW 11.106.080 makes each approved accounting "final, conclusive, and binding upon all the parties interested including all incompetent, unborn, and unascertained beneficiaries of the trust subject only to the right of appeal." As the Court of Appeals noted in *Barovic*, those word mean just what they say: "'[F]inal' [means] 'not to be altered or undone.' 'Conclusive' means 'putting an end to debate or question esp[ecially] by reason of irrefutability.' And 'binding' is defined as 'requiring submission, conformity, or obedience.'" *Barovic*, 128 Wn. App. at 201 (internal citations omitted) (citing Webster's Third New Int'l Dictionary (1976)). RCW 11.106.080 bars her claim, her minority notwithstanding, just as it barred Barovic's. The entire purpose of the Act is to bring finality.

F. In her opening brief, Ms. Anderson has failed to address other issues upon which the trial court's decision can be sustained.

As noted above, Ms. Anderson has failed to address issues that were thoroughly briefed to the trial court on judicial estoppel, res judicata, and limitation of actions. CP 440-50. The only issue on which she touches

is that of the Trustee's Accounting Act, discussed in the preceding section. The arguments Ms. Anderson did not address in her opening brief are adequate grounds upon which to affirm the trial court. "[P]oints not argued and discussed in the opening brief abandoned and not open to consideration on their merits. . . . In addition, a contention presented for the first time in the reply brief will not receive consideration on appeal." *Fosbre v. State*, 70 Wash. 2d 578, 583, 424 P.2d 901 (1967).

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. Ms. Anderson does not ascribe any of the trust management to Dussault or explain how he is responsible for it. Her opening brief only discusses this in relation to McMenamin and Well 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).

G. Dussault should be awarded reasonable attorney fees and costs on appeal under RCW 11.96A.150 and in equity.

1. This court has discretion to award reasonable attorney fees and costs pursuant to RCW 11.96A.150.

Pursuant to the Washington Trust and Estate Dispute Resolution Act ("TEDRA"), chapter 11.96A RCW , *et seq*., the court has discretion to award reasonable attorney fees and costs to any party in this action. RCW 11.96A.150. RCW 11.96A.150 provides as follows:

> Either the superior court **or any court on an 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 state or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the attorneys' fees, 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(l) (emphasis added).

Washington courts frequently award attorney fees pursuant to TEDRA[5] to parties in trust and estate disputes. *See Barlett v. Betlach*, 136 Wn. App. 8, 22-23, 146 P.3d 1235 (2006) (affirming an award of attorney

[5] While Anderson has disputed the application of this statute, she referred to it three times in her opposition to Dussault's motion for summary judgment and claimed that it was applicable to this case. CP 89, ¶ 18.

fees from the trust assets to a reinstated trustee who was wrongfully removed by the trust beneficiaries); *see also Estate of Kvande v. Olsen*, 74 Wn. App. 65, 72, 871 P.2d 669 (1994) (holding that legal fees incurred by an estate's personal representative in defending contested distributions from the estate were chargeable to the estate); *In re Irrevocable Trust of McKean*, 144 Wn. App. 333, 345, 183 P.3d 317 (2008) (awarding attorney fees to a court-appointed corporate trustee where the trust settlor moved to vacate the order appointing trustee); *In re Estate of Cooper*, 81 Wn. App. 79, 94, 913 P.2d 393 (1996) (affirming award of attorney fees payable from the trust where the trustee's administration and management of trust investments was challenged by a remainder beneficiary).

2. In equity, Dussault is entitled to reasonable attorney fees either from Ms. Anderson or from the Trust.

This case arises out of equity, and the equities favor Dussault in this matter. Ms. Anderson is no longer in need of the Trust, CP 56-62, and the action against Dussault, who did nothing more than prepare and submit reports to the court, is both factually and legally without merit.

> This case arises from probate. A probate court is a court of equity. The Trust and Estate Dispute Resolution Act gives broad authority to the courts to administer and settle all estate and trust matters. The right of a party to a jury trial in probate or court of equity is limited. For example, it is

> well established that there is no right to a jury trial in a will contest.

Foster v. Gilliam, 165 Wn. App. 33, 46-47, 268 P.3d 945 (2011) (citations omitted).

Ms. Anderson's declaration on February 14, 2012, and her Complaint almost exclusively concern the use that her mother made of funds that the Trust distributed. CP 56-62. These distributions were, however, appropriately reported to the Clallam County Superior Court, and at no place in her declaration does Ms. Anderson even mention Dussault as having done anything improper. While she complains that Wells Fargo's Trust Department and McMenamin inadequately monitored her Trust, CP 58-59, and complains about fees spent over the many years that the Trust was in effect, none of these were actions can be attributed to Dussault, who did nothing more than prepare reports, put them in proper form, and present them in court. On one occasion, Ms. Anderson's grandmother and father interfered with the presentment and caused a great expense. CP 345-47. Ms. Anderson completely fails to raise a genuine issue of material fact supporting her allegations that Dussault breached a fiduciary duty or committed legal malpractice.

On the other hand, it is clear from reading Ms. Anderson's declaration and Dussault's final report, CP 272, that she no longer needs

the Trust. She has gainfully employed herself, obtained an education at the Trust's expense, and does not claim that she needs and remaining funds. Her declaration is clear and cogent. She no longer suffers from any mental impairment. The equities therefore favor Dussault in the recovery of his fees.

VI. CONCLUSION

This court should affirm the trial court's decision to dismiss Dussault. Dussault represented Wells Fargo Bank solely in the capacity of preparing and presenting annual reports to the superior court. Dussault had no duty to Ms. Anderson, who was not a client. And under the plain terms of the Trust, there was no mismanagement in trustees purchasing her transportation, a computer, and a real property interest.

Even if Dussault had a legal duty to Ms. Anderson, collateral estoppel bars her claims because she had failed to appeal the dismissal of Ms. Davey. Res judicata also bars any argument that the Trust was mismanaged because Ms. Anderson brought causes of action identical to those that her grandmother and father unsuccessfully raised in the trust proceedings. In addition, under Washington's Trustee's Accounting Act, the Clallam County Superior Court's approval of Dussault's reports prohibits Ms. Anderson from claiming errors in the administration of her

Trust many years later. Furthermore, Ms. Anderson should be judicially estopped from arguing that the Trust was mismanaged after accepting the benefits of that Trust's management for so long. Accordingly, this court should award Dussault their reasonable attorney fees and costs on appeal.

Respectfully submitted this 3rd day of August 2012.

LEE SMART, P.S., INC.

By: _____
Sam B. Franklin, WSBA No. 1903

By: _____
William L. Cameron, WSBA No. 5108
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 ***Brief of Respondent Dussault*** in the manner indicated below to:

VIA FED-EX

Attorney for Plaintiff, WSBA #9272
Mr. Carl Lloyd Gay
Greenaway Gay & Tulloch
829 East Eighth Street, Suite A
Port Angeles, WA 98362

VIA ABC LEGAL MESSENGERS, INC.

Attorney for Defendants McMenamin and McMenamin & McMenamin, P.S., WSBA #11042
Mr. Steven Goldstein
Betts, Patterson & Mines, P.S.
One Convention Place, Suite 1400
701 Pike Street
Seattle, WA 98101-3927

Attorney for Defendant Wells Fargo Bank, N.A., WSBA #14376
Mr. James R. Hennessey
Smith & Hennessey, PLLC
316 Occidental Ave. S., Suite 500
Seattle, WA 98104

DATED this 3rd day of August 2012, at Seattle, Washington.

/s/ Julie DeShaw
Julie DeShaw, Legal Assistant

VII. APPENDIX

A. RCW 11.96A.090. Judicial proceedings

(1) A judicial proceeding under this title is a special proceeding under the civil rules of court. The provisions of this title governing such actions control over any inconsistent provision of the civil rules.

(2) A judicial proceeding under this title may be commenced as a new action or as an action incidental to an existing judicial proceeding relating to the same trust or estate or nonprobate asset.

(3) Once commenced, the action may be consolidated with an existing proceeding or converted to a separate action upon the motion of a party for good cause shown, or by the court on its own motion.

(4) The procedural rules of court apply to judicial proceedings under this title only to the extent that they are consistent with this title, unless otherwise provided by statute or ordered by the court under RCW 11.96A.020 or 11.96A.050, or other applicable rules of court.

B. RCW 11.96A.150. Costs--Attorneys' fees

(1) Either the superior court or any court on an 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; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, 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.

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. This section shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(10).

C. RCW 11.106.060. Account filed--Objections--Appointment of guardians ad litem—Representatives

Upon or before the return date any beneficiary of the trust may file the beneficiary's written objections or exceptions to the account filed or to any action of the trustee or trustees set forth in the account. The court shall appoint guardians ad litem as provided in RCW 11.96A.160 and the court may allow representatives to be appointed under RCW 11.96A.120 or 11.96A.250 to represent the persons listed in those sections.

D. RCW 11.106.070. Court to determine accuracy, validity--Decree

Upon the return date or at some later date fixed by the court if so requested by one or more of the parties, the court without the intervention of a jury and after hearing all the evidence submitted shall determine the correctness of the account and the validity and propriety of all actions of the trustee or trustees set forth in the account including the purchase, retention, and disposition of any of the property and funds of the trust, and shall render its decree either approving or disapproving the account or any part of it, and surcharging the trustee or trustees for all losses, if any, caused by negligent or wilful breaches of trust.

E. RCW 11.106.080. Effect of decree

The decree rendered under RCW 11.106.070 shall be deemed final, conclusive, and binding upon all the parties interested including all incompetent, unborn, and unascertained beneficiaries of the trust subject only to the right of appeal under RCW 11.106.090.