

64231-6

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NO. 64231-6

COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION I

DAVID L. MARTIN  
APPELLANT

VS.

LORETTA D. WILBERT, AS PERSONAL REPRESENTATIVE  
OF THE ESTATE OF WILLIAM E. WILBERT AND INDIVIDUALLY  
RESPONDENTS

**REPLY BRIEF OF APPELLANT**

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DIVISION I  
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While most of the “fireside chat” which constitutes the first seven pages of Respondent’s Brief is irrelevant and much of it seems to be from the writer's imagination, as those pages have only one CP cite, it would not be good practice to allow these allegations to remain unchallenged. Even though they are generally unimportant, the Respondent has drawn some conclusions that need to be corrected and explained, as some of the Respondent’s issues contain, or link to, items of relevant truth.

#### **DELAY HAS BEEN WILBERT’S MOST UTILIZED STRATEGY**

Respondent’s counsel wants to make an issue about the longevity of the case but Mr. Zeno has represented the Wilbert family in various phases of this litigation since 1996. Review of real estate recordings shows that he has assisted them to transfer many of the challenged properties and asset sales in recent years. His intransigence is also demonstrated by Appellant’s issue related to his deposition and Finca Delguzzi (Appellant’s Brief at \*11-13), the Delguzzi estate farm that Zeno told successor Administrator Ellis about and then denied before quickly scampering out of his deposition when questions on that subject became imminent<sup>1</sup>. Mr. Zeno did not deny the evidence of his covert email communications with Administrator Ellis about the missing Costa Rica farm, Finca Delguzzi, nor his prior false testimony

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Zeno was named as a trial witness for Plaintiff Martin in the pretrial witness disclosure.

where he alleged that all of the Jack Delguzzi estate assets, including the Costa Rica properties had been properly administered, conceding these facts. The failure to argue these matters leaves them conceded.

#### **SERVICE ISSUES ON THE 2006 SUMMONS AND COMPLAINT**

Mr. Zeno's transparent attempt to convince that the 2006 Complaint and Summons were served March 7, 2007, or 91 days after filing is demonstrably untrue, based upon the record.

Service was initiated immediately after filing of the 2006 Summons and Complaint, but with no success. On February 16, 2007, a Declaration of Diligence [CP 1614] showed that another means was going to be necessary and Mr. Zeno was contacted and agreed with the process server, Matt Olson, to accept and acknowledge service. [CP 1625] The appropriate form, undated, was delivered to his office on February 28. [CP 1613 ] When that failed to produce results, another form, dated March 5, was delivered to Mr. Zeno's office. [CP 1616]. The Declaration of Service stated that Zeno was in his office but refused to either accept service or acknowledge receipt of the summons and complaint. Zeno later produced both of the two Acknowledgment and Acceptance of service forms having signed and dated them March 6. [CP 1634 & 1635] The fax date stamps on these forms showed their actual dates, February 28 and March 5. Mr. Zeno then claimed in Respondent's Brief that service was made on March 7, 2007. By then, service had already also been made by publication [CP 1594] and by

mail on March 2, 2007. [CP 1591]

Mr. Zeno slyly tries to appear to concede a jurisdictional issue, to establish March 7, 2007 as the service date for the 2006 summons and Complaint at \*33 of his Brief, but the evidence shows otherwise.

#### ZENO CONCEDES LAURE WILBERT'S ESTATE FILES TESTIMONY

Mr. Zeno also did not deny that the testimony of Ms. Laure Wilbert, the daughter and office manager of Mr. Wilbert and Zeno's nonparty client who testified that she delivered "three or four" file boxes of estate records to Mr. Zeno for delivery to Administrator Ellis. He also did not offer any reason why those records should not have been produced, another concession of facts that fully support Martin's claim of abuse of discretion in denial of his motions to compel.

#### THE IRS AUDIT & NOTICE OF DEFICIENCY HAS DARK SIDES

Zeno's characterization of the IRS as a 'new' creditor (at \*5) is significant, but not for the reason he suggests. He does not cite to the record, but the "Notice of Deficiency" is CP 1413, *et seq.* In 1982, Mr. Wilbert received this Notice challenging the earlier estate tax return with the IRS' analysis after audit at CP 1414:

Line	Description	CLAIMED	ACTUAL
	"Return as Filed" (taxable estate)	\$3,110,922	
	Taxable estate, revised (see fn. 2)		\$9,593,408
12	Tax on original	\$1,113,255	
13	Increase in estate tax due to audit	\$4,618,931	

Line	Description	CLAIMED	ACTUAL
7	Total federal estate taxes assessed	\$5,732,186	
	Actual federal estate tax paid (per Zeno)		(350,000)
	Inheritance tax paid [CP 914]		(150,000)
NET VALUE AFTER ACTUAL TAXES PAID			9,093,408

During his entire administration, Mr. Wilbert pointed to this assessment [CP 929] and used it as one of his many excuses for paying only himself and his attorneys. But, as Mr. Zeno points out, Wilbert only paid the IRS \$350,000 in settlement of the total claim of \$5,732,186. Normally, this would be a joy to the heir and creditors, but since Mr. Wilbert never accounted for or paid over this increased value in the amount of \$6.1-\$4.3 million, it only benefitted him, with no benefit to the estate and only a source of frustration to other creditors.

Had Wilbert properly administered the estate, he would have paid the assessed taxes (estate \$4,762,388 + inheritance \$1,005,798 = \$5,768,186) and the net estate, after taxes, would have been \$3,825,222 (\$9,593,408 - \$5,768,186). Since Wilbert only paid \$500,000 in actual taxes (IRS \$350,000 + DOR \$150,000), the above after tax net has to be adjusted by the adding the difference between the reduction for the assessed amount and the actual taxes paid. It is necessary to add the \$5,268,168 assessed, but unpaid, taxes to \$3,855,222, leaving a net estate after actual taxes paid and administration expenses of \$9,093,390 or nearly three times Wilbert's claimed valuation on the initial federal

estate tax return, shown as the first value as “Return as Filed”[CP 1414]. The detailed IRS audit value worksheets can be found at CP 1415-1428.

This deceptive sleight of hand appears to be the \$7.3 million that Mr. Wilbert’s CPA identified, but did not know where to find, that Delguzzi III’s law of the case held to be the net value of the estate in 1989. This was the same figure that Martin’s CPA Beaton determined had still never been distributed or otherwise accounted for in August of 2009. [CP 1042-4 & 1177-1080].

#### **UNCONTESTED MISSING RECEIVABLE IN WILBERT’S REPORT**

The above \$7.3 million receivable that appeared in Wilbert’s final accounting prepared by Wilbert’s CPA Kleinman, was also noted as the first item in the “Fact” section of Division II’s Delguzzi III Unpublished Opinion of August 31, 2001. It was also included in Appellant’s Summary Judgment Response as explained by Martin’s CPA, Neil Beaton, who could find no mention of the disposition of the missing millions of dollars. [CP 1042-3 & exhibits at 1177-1080]. Delguzzi III established the asset value as the law of the case and Mr. Beaton showed that it was missing as not distributed or otherwise accounted for as of Wilbert’ summary judgment hearing on August 21, 2009. Neither this value nor its disappearance, were challenged by Respondent’s Brief, leaving the issue conceded.

#### **GARY’S ESTATE PROTEST: MISSING JOINTLY OWNED ASSETS**

When Zeno claimed that Wilbert's fees were "vigorously objected to" (at \*11) when Administrator Ellis moved to make a distribution in 2005, he cited to CP 958-971 to support that claim. Review of that document shows that it is a counter-motion for constructive trust to shelter the assets that Gary and his father, Jack, and their partner Charles Nyhus, owned that had not been accounted for and not distributed to Gary. The counter-motion does not mention Mr. Wilbert's fees, as Zeno alleged, but it does show missing jointly-owned assets alleged to total more than \$6.2 million. Some of that value was included in the above estate tax valuations, but exactly how much has not been determined due to incomplete discovery responses from Wilbert. A conservative calculation would be one-third or \$2.1 million, which would be in addition to the above approximately \$9.1 million, above. This was conceded by Wilbert's failure to offer contrary argument or evidence.

#### MISCELLANEOUS ISSUES

As to the identification of the Appellant, David Martin as the "business associate" of the undersigned, the only association is a professional one, as Mr. Martin is the client. There is no other "business association" between Mr. Martin and the undersigned.

When Respondent stated (\*8, ¶2) that Gary Delguzzi did not appeal the Memorandum Decision or Order Regarding Administrative Expense Reimbursements and "This normally would have been the end

of the matter,” Zeno had good reason to know that was not true. Gary Delguzzi's 1996 Complaint for Damages had been dismissed and was solely under the jurisdiction of Division II during the 1997 fee hearing as well as when those two orders were entered on October 10, 1997 and June 6, 1998. The trial court therefore had no jurisdiction over Gary Delguzzi's claims until remand following entry of Delguzzi III.

Respondent continues to assert that the causes of action in the 2006 Complaint are not understood, Mr. Zeno seemed to understand them very well when he signed a declaration [CP 1673-76] where he characterized the 2006 Complaint as “up-to-date” and “well-informed” in 2007, after closure of the Jack Delguzzi estate. He waived any claim of lack of understanding the 2006 Complaint when he failed to move for an order to make the Complaint more certain and definite.

#### **LAW OF THE CASE DEFEATS WILBERT'S SUMMARY JUDGMENT**

When the Delguzzi III Unpublished Opinion was entered on August 31, 2001, it established the law of the case as to the absence of any basis for preclusion, whether collateral estoppel, law of the case or res judicata. See Appellant's Brief at \*16-18) and CP 1046-47. The detailed and unmistakable rationale for Division II's reversals of the trial court's application of preclusion doctrines to Gary's Complaint for Damages were not merely to avoid injustice, but because of the trial court's denial of due process to Gary which had never been remedied, which remains true to the present.

[T]he issue before us on appeal is not the same as the issue decided at the January 21, 1997 hearing. Again, that hearing focused on the estate administrator's petition for approval of his fees and plan of distribution. It did not resolve DelGuzzi's tort claims and related issues because the previous judge had dismissed DelGuzzi's action and had not granted his motion to compel Wilbert to produce necessary documents. [Delguzzi III at \*17]

See excerpts from Delguzzi III in Appellant's Brief at \*16-18.

Law of the case, as here applied, upholds the binding effect of determinations made by the appellate court on further proceedings by the trial court on remand. Bunn v. Bates, 36 Wash. 2d 100, 216 P.2d 741(1950). The exception to law of the case doctrine where there is a retrial, does not apply here, as there was no retrial and no further proceedings after Delguzzi III to argue that there has been a substantial change of facts. Schofield v. Northern Pac. Ry. Co., 13 Wash. 2d 18, 123 P.2d 755(1955).

Nor could the 2006 Complaint have been resolved by the closing of the estate by Administrator Ellis, as Judge Costello, the assigned judge, acknowledged his disqualification from hearing it on June 29, before closing the estate on July 27, 2007. See Appellant's Brief at \*20-21.

Delguzzi III's law of the case established not only the inapplicability of preclusion doctrines as to Gary's Complaint but that the net remaining value of the inventoried and disclosed Jack Delguzzi estate in 1989 at \$7.3 million, which was verified by the accounting and testimony of Mr. Wilbert's CPA, Craig Kleinman and by Appellant's CPA, Neal Beaton, in Response to Wilbert's summary

judgment motion on August 21, 2009. That missing asset (receivable) and its value have never been accounted for by either by Administrator Ellis or by Mr. Wilbert and it does not include the other uninventoried and unadministered assets listed in Martin's Response to the Wilbert summary judgment motion, which also was not addressed or argued in Respondents' Brief and is thus conceded.

#### **WILBERT'S CONCESSIONS DEFEAT SUMMARY JUDGMENT**

Since the Respondent's Brief did not address this receivable or the other assets that were not inventoried and administered as detailed in the Response to Wilbert's summary judgment motion, their nature as missing and their values have been conceded. There has been no showing that any of those assets (Finca Delguzzi, the \$7.3 million receivable, \$1.44 million from Costa Rica, the Pacific County Washington properties many of which were transferred to Wilbert family members or their alter egos) or the substantial losses to the estate from the loans were inventoried or properly disclosed in the only inventories Wilbert filed, January 24, 1984 [CP 1636-47] and November 31, 1996 [CP 1648-1652] as the inventories do not include these assets or explain their absence.

#### **COSTA RICA CHECKS DEFEAT SUMMARY JUDGMENT**

The \$1.44 million in checks drawn on Costa Rica banks and payable to Mr. Wilbert for the estate's Costa Rica interests is substantially different from what his testimony in the Supplement to the Final

Report and Petition for Decree of Distribution details at pages 31-33 Wilbert's allegations about sale of the Costa Rica properties. [CP 927-9]. While Mr. Zeno points to pages 23-24 [CP 919-30(sic)], that testimony described a development agreement with a German group that was ended by default due to one member's illness in 1988 rather than the cash sale in "late 1993."

The actual sale of the estate's interests as explained at pages 31, *et seq.*, showed the transaction was for a total of \$400,000. Mr. Wilbert kept some of the sales price for what he claimed, without any supporting evidence, was "his 20% interest," leaving \$320,000 to go the estate and \$80,000 to Wilbert, not the \$1.44 million that the checks made out to him equal. The checks [CP 1505-6] all are dated in either December 1994 or January 1995, consistent with Wilbert's claimed transaction date. The last of the checks is even apparently certified in Spanish by Senor Iglesias, Mr. Wilbert's lawyer. [CP 1506].

Zeno's argument as to what these checks to Wilbert were in payment for establishes an issue of disputed material fact sufficient to defeat Wilbert's summary judgment motion.

#### **WILBERT'S SUPPLEMENT PROVES ANOTHER MISSING ASSET**

The Respondent apparently sought to avoid page 31 of the Supplement to the Final Report and Petition for Decree of Distribution [CP 927] for another reason as well: to dodge the issue of the missing

Costa Rica farm, mentioned at footnote 13, which was still missing when the estate was closed. This is another Wilbert concession.

#### WILBERT'S 'TWO CASES' ARGUMENT LACK LEGAL SUPPORT

The Respondent complains loudly about “two cases,” but that was the result of her own choices. Had Gary’s estate not timely filed a creditor's claim against the Wilbert estate after Mr. Wilbert's death, then that estate would certainly have moved to dismiss the 1996 Complaint for Damages. Gary’s estate had no reasonable option but to file the creditor’s claim. When Ms. Wilbert denied the creditor's claim, instead of exercising one or more of the many other options available to her in 11.40.100(2), Gary’s estate then had no choice but to file a complaint or face having his claims attacked and possibly determined to be forever barred, just as the RCW 11.40.100 notice sent by Ms. Wilbert stated would happen.<sup>2</sup>

Ms. Wilbert then had the option of pleading abatement as an affirmative defense or making a timely CR 12(b) motion based upon that defense. Instead, she waived those rights by waiting until the 1996 Complaint for Damages case had been closed in July 2007, as it was filed within the estate of Jack Delguzzi Clallam County cause number 8087, and it bore the same cause number, so in addition to waiver, the

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“The [creditor claim rejection] notice must advise the claimant that he or she must bring suit against the personal representative in the proper court within 30 days of notification of rejection or the claim will be forever barred.” WSBA Probate Deskbook, §7.3(5)(a).

“two cases” issue became moot by the closure of the Jack Delguzzi estate on July 29, 2007. And when that closure was appealed, Wilbert did not raise the “two cases” issue as a cross-appeal or in her own briefing, leaving it now unappealable. RAP 5.2.

It could be argued that the tolling of any statutes of limitation afforded by RCW 4.16.170 was ended by the closure of the Jack Delguzzi estate, but any such argument must fail since the later Complaint had then been filed and served in March of 2007, triggering RCW 4.16.170 again, leaving no time when its tolling was not operative. The unbroken tolling is illustrated by the demonstrative time line at Appellant’s Appendix 4.

While Gary’s estate had no other realistic choices, in order to survive, it had to proceed as it did, Wilbert’s estate waived or missed its opportunities to challenge Gary’s estate’s procedural actions.

In addition, the substitution of parties contemplated by RCW 11.40.110 was accomplished in 2004 [Sub#51]<sup>3</sup> initiating another aspect of the “comprehensive statutory scheme” that Justice Sanders emphasized in Young v. Estate of Snell at 383 & 384<sup>4</sup>.

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Declaration of Zeno filed July 8, 2009. See Appellant’s Supplemental Designation of Clerks’ Papers, October 12, 2010.

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134 Wash.2d 267, 948 P.2d 1291(1998). The majority opinion was principally designed to “fully implement[s] the contract of insurance between the insurer and the insured”, as their quote from Greentree v. Fertitta, 659 A.2d at 1329-30 on page 282 of the opinion points out.

The necessity of *timely* raising the abatement is addressed in an early case under the Civil Rules, Dowell Co. v. Gagnon, 36 Wn. App 775, 776, 677 P.2d 783(1984) holding that failure to timely raise the defense constitutes a waiver. The same result is dictated by CR 12(b) requiring that CR 8(c) affirmative defenses be raised by motion to be filed at or before the answer is due or that they cannot be raised later. CR 12(g) prohibits a later motion on the CR 8(c) affirmative defenses, so that even if Wilbert had not waived the abatement defense and the closure of the Jack Delguzzi estate had not rendered the issue moot, Wilbert's failure to include abatement as part of her affirmative defenses barred her from raising it.

Since the 2006 Complaint was amended several times after filing, the necessary foundation for abatement, i.e., that it is to be established from the four corners of the complaints, also bars the abatement defense as a matter of law<sup>5</sup>.

**THE TWO CASES WERE NOT ABSOLUTELY THE SAME**

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Hasek v. Terrene Excavators, Inc., 44 Wash. App. 554, 723 P.2d 1153(1986) holds that filing of an amended complaint in the later case bars an abatement defense, based upon the principle that abatement must be proven from the complaints. The 2006 Complaint was amended several times after filing on December 7, 2006. [CP 619]

While Wilbert argued (at \*9-10) that the 2006 case [CP 619-628] alleges “similar wrongdoing”<sup>6</sup> to that in the closed Jack Delguzzi estate Complaint for Damages, mere similarity will not support an abatement defense. Judge Costello found no basis for abatement when Gary’s 2006 complaint came up before him on June 26, 2007, and he held that he was disqualified from sitting on it by an affidavit of prejudice. Had it been the same case as the 1996 Complaint for Damages filed in the estate of Jack Delguzzi probate, then it would not have been possible to effect disqualification of Judge Costello by an affidavit of prejudice, as he recognized at the hearing. Wilbert did not appeal Judge Costello’s holding.

Jack Delguzzi’s estate closed on July 27, 2007, with Gary’s claims never having been heard or ruled upon and the law of the case since Delguzzi III on August 31, 2001 still holds that his claims were not subject to preclusion by the doctrines of res judicata, collateral estoppel or law of the case. Gary’s claims were not addressed in the estate closing order.

The issues posed by the tolling of a statute of limitation by filing of the first complaint and then the filing of the second complaint before that had been resolved are actually very simple. If it should be held that

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See prior discussion under Miscellaneous Issues, above and CP 1673-76., where Mr. Zeno characterized the 2006 Complaint as “up-to-date” and “well-informed” in 2007, after closure of the Jack Delguzzi estate.

for any reason RCW 4.16.170 no longer tolled the statute of limitations after Mr. Wilbert died, then the two RCW 11.40 limitation periods of the “comprehensive statutory scheme” that Justice Sanders described in his dissent in Young v. Estate of Snell, *supra*, then the period of tolling for four months after the date of the first publication of the notice to creditors allowed for filing and service of creditor’s claims, would first act to toll any statute of limitations. Then, after denial of the creditor’s claim, 30 days is allowed to file the suit before RCW 11.40.010 requires that it be forever barred. Since filing and service were successfully completed within these tolling periods, once the 2006 Complaint was filed and served, then RCW 4.16.170 again operates to toll any statutes of limitations until the matter is resolved.

RCW 11.40.110’s substitution provisions were also complied with, preserving Gary’s claims without interruption under the RCW 4.16.170 tolling statute.

### CONCLUSION

Wilbert’s issues ‘hoist her upon her own petard’<sup>7</sup>, as the deceptions and attempts to convert the case into an *ad hominem* attack to divert attention from the merits becomes more obvious and frantic.

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“This Shakespearean phrase, meaning ‘ruined by one own scheming against others’ . . . in *Hamlet* is ‘hoist with his own petar’ . . . literally to blow oneself into the air with one’s own bomb.” Page 409, Garner’s Modern America Usage, Bryan A. Garner, Oxford Univ. Press, 2003).

Respondent's brief is little more than an extended plea for sympathy, but not one based on a foundation of unjustified suffering, but instead upon how hard it has been to cover up and hold onto to large numbers of converted assets worth enormous sums of money, all taken in notorious disregard of many fiduciary duties.

Every attempted plea for sympathy by the Respondent has a dark and dirty side: The Wilbert claim that the IRS additional estate tax deficiency imposed after audit automatically increased taxes making Wilbert's administration short of operating funds has its obverse showing that the estate's assets thus had to be three times greater than disclosed by Wilbert otherwise there could have been no increase in assessed taxes. And, when seeking to show what a great job did in reducing the federal estate tax from \$5,732,186 to \$350,000, Mr. Wilbert failed to apprise anyone that this settlement reflected \$5,982,486 in additional estate equity above and beyond the taxable estate amount Mr. Wilbert was still claiming in 1997.

The claims that Gary's estate that did not timely serve the 2006 complaint, when scrutinized, show the dishonesty and deceit of Wilbert's lawyer in trying to set up a delay to the service after agreeing to accept it on behalf of his client and then intentionally staging a false date.

There is more, but enough should be enough. Mr. Martin wants nothing more than a fair trial. If he loses after that, the case is over.

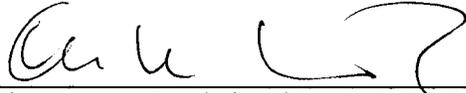
Wilbert has conceded issues alone that should provide more than enough to order summary judgment in Martin's favor. The contested issues that are the remainder of this appeal bar any affirmation of summary judgment for Wilbert as there are contested issues of fact that must be tried.

The nightmare is not Wilbert's but that of the people of this state who must rely on the courts to enforce compliance by fiduciaries to their duties and the lesson that now allows what Wilbert did to the Jack Delguzzi estate during his unprecedented 28-year administration. Continuing the trial court's approval of the very real nightmare that Mr. Wilbert orchestrated requires nothing less than a trial of all the issues that the Respondent's Brief has not already conceded.

Gary Delguzzi died an early and lonely death, in poverty, hastened by his lack of the means to pay for the health care that could have extended his life. He should have had several millions of dollars to pay for his care and medications. Mr. Wilbert died less than two months after Gary, but lived two decades longer. He spent more than two decades beating Gary with his own inheritance as Gary sought to close his father's estate to benefit from his rightful inheritance.

All that can be done now to tip the scales back toward fairness is to finally allow a fair trial of Gary's claims. That will not constitute a vendetta or a 'jihad' as Mr. Zeno has asserted. A trial cannot now provide justice, but it is the best that can now be achieved.

Respectfully submitted on this October 12, 2010.



Charles M. Cruikshank III WSBA 6682  
Appellant's Attorney

Certificate of Service

The undersigned hereby certifies that a copy of the foregoing was served upon the document following and below named parties and/or attorneys by U S Mail, 1<sup>st</sup> class postage prepaid on October 12, 2010.

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