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No. 31738-9-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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DIVISION II
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STATE OF WASHINGTON
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DEPUTY

Joseph Kwiatkowski,

Appellant,

v.

Ralph Drews, James Frost Seattle First National Bank (Bank of
America), Puget Sound National Bank (Key Trust Company), and
U.S. Bank Trust Department,

Respondents.

RESPONDENT KEY TRUST COMPANY'S
aka Puget Sound National Bank's BRIEF

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I. INTRODUCTION AND STATEMENT OF JOINDER

The trial court properly enforced the settlement of Kwiatkowski's claims against Key. This Court should affirm that decision. The case concluded when Kwiatkowski entered the settlement agreement with Key in January 2005. Moreover, it was finished more than a decade prior when the guardianship court discharged Key and no party appealed that order. In June 2004, the trial court in this lawsuit granted summary judgment to Key on the basis of the guardianship court discharge. To attempt to hold Key liable now, especially for an asset over which Key had no responsibility based on court order, is absurd.

Key¹ joins in the brief of Respondent Bank of America/Seattle First. Bank of America/Seattle First's Brief sets forth general facts and addresses issues common to the three bank defendants ("the Banks"). This includes the enforceability of the settlement agreement, the prior summary judgment orders based on the guardianship court's discharge orders to the Banks, and the trial court's fee awards.

This brief addresses the facts and issues unique to Key. Key was limited guardian of Kwiatkowski's estate from September 30, 1991 to

¹ Respondent Key Trust Company's predecessor was Puget Sound National Bank ("PSNB"). Throughout this brief and in the trial court proceedings Key is referred to as "Key." The underlying guardianship refers to PSNB.

October 1, 1993. Kwiatkowski's claims brought in January 2004 against Key were ill-founded. They were based on management of the stock of Sirius Enterprises, Inc. d/b/a Great American Herb Co., an asset which the guardianship court ordered Key not to manage. Dismissal of the claims should be affirmed—Kwiatkowski settled the claims and the guardianship court previously discharged Key from liability.

II. ISSUES ON APPEAL

Issues on appeal relevant to Key are:

1. Did the trial court err by enforcing the Settlement Agreement wherein Kwiatkowski assumed the risk of discovery of new facts or evidence and warranted that he was not relying on representations by the Banks?
2. Does the guardianship court's unappealed, final order of February 18, 1994, signed and approved for entry by Kwiatkowski's guardian *ad litem*, discharging Key from liability in the underlying guardianship preclude Kwiatkowski's subsequent claims against Key?
3. Did the trial court err by granting summary judgment to Key based on Key's unappealed discharge order?
4. Was the trial court's granting summary judgment proper when Kwiatkowski failed to present evidence to support a *prima facie* case against Key?

5. Did the trial court abuse its discretion in awarding attorneys' fees and costs to Key on the ground that Kwiatkowski should bear the expense of his last-minute motion practice and discovery requests?

6. Should the attorneys' fees and costs award to Key be affirmed on the basis of Paragraph 10 of the Settlement Agreement which requires an award to a party prevailing in enforcement of the Settlement Agreement?

7. Did Kwiatkowski properly preserve a challenge to the reasonableness of Key's attorneys' rates when he did not even raise the issue of Key's attorneys' rates to the trial court?

8. Is Key entitled to an award of attorneys' fees and costs on appeal based on either RCW 11.96A.150 or Paragraph 10 of the Settlement Agreement?

III. STATEMENT OF THE CASE

Key augments the facts set forth in Bank of America/Seattle First's Brief with additional facts particular to Key.

A. Key Performed Its Duties as Limited Guardian, Concluding With Its Discharge by Order Dated February 18, 1994, Which No Party Appealed.

Key (as "PSNB") was limited guardian in Kwiatkowski's underlying guardianship from September 30, 1991 to October 1, 1993.

CP 3955-3957. CP 3927-3929. The Thurston County Superior Court discharged Key by order dated February 18, 1994, making the discharge effective October 1, 1993. CP 3927-3929. Kwiatkowski's guardian *ad litem* had full knowledge of the circumstances of Key's services. These services were also amply documented in the court records of the guardianship.

When the Thurston County Superior Court appointed Key as Successor Limited Guardian, it expressly limited Key's duties to exclude responsibility for Sirius Enterprises, Inc., d/b/a Great American Herb Company. CP 3947-3953. CP 3955-3957. The order appointing Key stated:

PSNB is hereby appointed as Successor Limited Guardian of all the assets of Joseph Kwiatkowski, with the exception of the common stock of Sirius Enterprises, Inc., a Washington corporation, doing business as the Great American Herb Company, which stock shall continue to be managed and controlled by James M. Frost and Ralph H. Drews as Special Administrators pursuant to previous orders of this Court....

CP 3956, ¶ 1 (emphasis added).

The guardianship court had appointed other fiduciaries to administer certain aspects of Kwiatkowski's estate. During Key's entire term as guardian, Drews and Frost served as court appointed Special Administrators with exclusive responsibility for Sirius Enterprises, Inc.

CP 4035, ¶ 4. CP 3955-3957. Also during Key's entire tenure as Limited Guardian, John Parr served as guardian *ad litem* for Kwiatkowski. Parr's responsibility included reviewing and approving reports of the various fiduciaries on behalf of Kwiatkowski. CP 3941-3942 and CP 4018-4019. *See also* CP 3947-3953, CP 3957, CP 3961, CP 4023, CP 4025, CP 4031.

During Key's two-year tenure as Limited Guardian, the guardianship court entered orders approving the two annual reports filed by Key. CP 4021-4023. CP 3927-3929. The guardianship court approved both of these reports after guardian *ad litem* Parr reviewed and approved them. CP 4023. CP 3929. Neither Kwiatkowski nor his guardian *ad litem* appealed the entry of those orders or moved within one year pursuant to CR 60 to vacate or amend those orders. Kwiatkowski's disability was removed on January 26, 2001. CP 216, ¶ 3.9. Kwiatkowski did not appeal the entry of those orders or move pursuant to CR 60 within one year of the removal of his disability.

Key's resignation and petition for discharge were at the request of guardian *ad litem* Parr. On or about August 23, 1993, Parr notified Key that Kwiatkowski had decided to transfer his assets to U.S. Bank at the same time as Key filed its annual accounting for that year. CP 4025. Guardian *ad litem* Parr's letter concluded by stating, "This will allow the parties to present their final issues concerning Key Trust Company's

services, get a court order, and transfer the assets over in the most efficient manner.” CP 4025.

In accordance with this directive by guardian *ad litem* Parr, Key resigned as limited guardian. Key filed its Second and Final Report of November 22, 1993, CP 4013-4016, and the guardianship court entered an order of February 18, 1994, approving the resignation and discharging Key as limited guardian effective October 1, 1993. CP 3927-3929. All persons entitled to notice waived notice of hearing and consented to entry of the order. CP 3927 (“All persons entitled to notice of the hearing . . . have waived notice of hearing and have consented to entry of an order approving said report and granting the relief prayed for therein.”) In his capacity as guardian *ad litem*, Parr signed and “Approved for entry” the proposed order. CP 3929.

The final paragraph of the order discharging Key from all liability stated:

That the resignation of Key Trust Company as limited guardian of the estate of Joseph Kwiatkowski is hereby accepted by the court and approved effective 10/1, 1993, and that Key Trust Company is hereby discharged from all further liability in connection with its duties as limited guardian of the estate of Joseph Kwiatkowski; provided, however, that this discharge shall be effective only upon Key Trust Company filing herein receipts covering payment of the fees allowed herein and a receipt from U. S. Bank Trust Department when it is appointed by this court as successor limited guardian, acknowledging transfer to

such successor limited guardian of the net assets of the guardianship of the estate, plus income realized after September 30, 1993, and less expenditures for obligations incurred after said date.

CP 3928, ¶ 4 (emphasis added). The *guardianship court* made the discharge effective as of October 1, 1993, inserting that handwritten date.

CP 3928. No evidence suggests that Key sought this particular date, although the date is logical given that Key's Final Report went through September 30, 1993. The order itself shows that the guardianship court and the guardian *ad litem* were both aware that a gap would occur between Key's resignation and the appointment of a successor; it refers to the fact that U.S. Bank Trust Department has not yet been appointed successor limited guardian. CP 3928, ¶ 4.

In accordance with the order, Key thereafter filed with the Court the required receipts necessary to effectuate its discharge: 1) Key filed a receipt dated March 7, 1994, evidencing payment of the fees owed to Key, CP 4027; 2) Key filed a receipt of attorney fees dated April 5, 1994, evidencing payment to Arthur Davies, CP 4029; 3) Key filed a receipt of attorney fees dated March 29, 1994, evidencing payment to Parr for his fees as Kwiatkowski's guardian *ad litem*, CP 4031; and 4) a sworn statement of a trust officer at U.S. Bank was filed with the Court evidencing U.S. Bank's receipt of the assets "from predecessor guardian" Key. CP 4033-4078 at 4034, 4040.

Kwiatkowski conceded during oral argument at the summary judgment hearing that the conditions of Key's discharge order as to the filing of receipts were met. CP 885, line 4 to CP 887, line 7. At the conclusion of this discussion, the trial court summarized Kwiatkowski's concession:

THE COURT: So at least as to the argument pertaining to receipts never being filed as to all three bank defendants that issue is moot. It was moot many years ago. So that is not in contention, correct?

MR. DOUMIT: Yes, we would concede that.

CP 887, lines 2-7.

B. The Evidence and Argument Before the Trial Court on Key's Summary Judgment Motion Are Specifically Set Forth in the Order.

The summary judgment was straightforward. While Appellant's Brief and Designations of Record include voluminous materials, the trial judge clarified precisely what evidence and issues it considered in granting summary judgment to Key, namely:

1. Key Trust Company's Motion for Summary Judgment and Sanctions [CP 681-695];
2. The Declaration of Steven A. Miller in Support of Defendant Key Trust Company's Motion for Summary Judgment and Sanctions [CP 3923-4078];
3. Plaintiff's Motion to Set Aside Specified Orders and for Orders Requiring Full Accountings [CP 703-705];
4. Memorandum of Authorities in Support of Plaintiff's Motion to Set Aside Specified Orders and for Orders Requiring Full Accountings and in Opposition to Defendants' Bank of America, KeyBank, and U.S. Bank

- Motions for Summary Judgment [CP 539-563];
5. Declaration of Donna Holt [CP 564-565]; and
 6. Key Trust's Reply in Support of Motion for Summary Judgment and Opposition to Motion to Set Aside Key Bank's Discharge Order [CP 4185-4193].

CP 3032-3034. These six pleadings and the exhibits attached thereto are the only evidence and issues that were called to the attention of the trial court when it considered Key's motion for summary judgment. The voluminous materials identified by Kwiatkowski on appeal were not before the court.²

Kwiatkowski's opposition materials did not address Key's argument that he could not establish a prima facie case against Key. CP 539-563 (Kwiatkowski's Opposition). CP 687-688 (Key's argument).

C. Kwiatkowski Alleged "Discovery" of "New Facts" That Were Not New.

The uncontested record before the trial court shows that Kwiatkowski's alleged "new facts" are derived entirely from the public record, as explained here.³

1. **Kwiatkowski, the other fiduciaries, and the guardianship court were aware of Key's classification of the Sirius Enterprises stock.**

² The materials outside of the summary judgment record do not result in a different outcome, but are not properly considered during appellate review.

³ See also CP 1602-1607, Key's briefing below addressing "Irregularities."

The stock of Sirius Enterprises was technically part of the estate, but the court's orders clearly provided that the asset was *not* managed by the limited guardians—such stock was under the management and control of James M. Frost and Ralph H. Drews as Special Administrators. CP 3956, ¶ 1. The Fourth and Final Account of Bank of Seattle First (aka Bank of America), which was approved by the court, see CP 309-319, makes this clear, stating:

As previously noted, SFNB as limited guardian of the estate is not involved in the management of Great American Herb Company, although technically the stock of Sirius Enterprises, Inc., is an asset of the guardianship estate.

CP 4674.

The guardianship court did not alter the responsibilities of the limited guardian of the estate when Key was appointed Successor Limited Guardian. CP 3955-3957. The October 18, 1991 order appointing Key as Successor Limited Guardian continued the existing allocation of duties:

PSNB[/Key] is hereby appointed as Successor Limited Guardian of all of the assets of Joseph Kwiatkowski, with the exception of the common sock of Sirius Enterprises, Inc., a Washington corporation, doing business as The Great American Herb Company, which stock shall continue to be managed and controlled by James M. Frost and Ralph H. Drews as Special Administrators pursuant to previous orders of this Court, such appointment to be effective September 30, 1991.

CP 3956, ¶ 1. Key did not manage the stock in Sirius Enterprises, Inc., pursuant to court order.

2. Kwiatkowski, the other fiduciaries, and the guardianship court were aware of Key's \$500,000 Guaranty against Kwiatkowski's estate.

Key's \$500,000 Guaranty was created and continued with court approval. The Guaranty appears throughout the guardianship records. On March 5, 1991, the court authorized Seattle First/Bank of America to sign a personal guaranty on Kwiatkowski's behalf to secure a \$500,000 revolving line of credit from Key to the Great American Herb Company. CP 4655-4661. The court order provided that this guaranty "shall be a continuing guaranty" covering renewals and extensions of the credit line by Key. CP 4659. This was done with express court approval and before Key became Limited Guardian in Kwiatkowski's guardianship.

When the court subsequently appointed Key as Successor Limited Guardian on October 18, 1991, this continuing guaranty continued with full knowledge of the court and the parties. CP 3955.⁴

⁴ The appointment order recites: ". . . the Successor Limited Guardian shall place an immediate charge of \$500,000.00 against the cash equivalents of the Ward's Estate in order to continue the collateralization of the Continuing Guaranty given by the Original Limited Guardian as directed by the Court and that the Successor Limited Guardian shall continue such charge. . . ." CP 3955-3956. The Order directs a charge against Mr. Kwiatkowski's assets in the amount of \$500,000 in order "to

3. Kwiatkowski, the other fiduciaries, and the guardianship court were aware of the gap between Key's discharge and the appointment of the next successor.

The guardianship court record shows the gap between Key's discharge and the appointment of the next successor. The court, the guardian *ad litem* Parr, and Kwiatkowski were well aware of it. Kwiatkowski, through his guardian *ad litem*, communicated his intent to terminate his relationship with Key at the time Key filed its second annual accounting in the fall of 1993. CP 4025. Key's second annual accounting for 1993 and petition for discharge dated November 22, 1993 (CP 4013-4016), was specifically approved by the Court by its order of February 18, 1994. CP 3928. The discharge order specifically notes that the successor had not yet been appointed. CP 3927-3929. Thus, Kwiatkowski, his guardian *ad litem*, and the court knew that Key's service was ended as of October 1, 1993. These court documents were cited and submitted in briefing for the summary judgment hearing in June 2004. CP 682-684.

continue the guaranty for the loan by PSNB[/Key] to the Great American Herb Company." CP 3956-3957. The Order further states, "The charge against the assets shall continue until further Order of this Court."

4. Kwiatkowski previously conceded the issue of the filing of receipts at the conclusion of Key's service and proof that the assets were transferred by Key to U.S. Bank.

Key complied with the conditions of its discharge. *See* III.A, *supra*. Kwiatkowski conceded the same at the summary judgment hearing, specifically agreeing that “the argument pertaining to receipts never being filed” is moot. CP 887, lines 2-7.

D. Key's Attorneys' Fee and Costs Award.

The trial court twice awarded Key attorney's fees and costs associated with this litigation. When the Court granted Key's Motion for Summary Judgment on June 4, 2004, it originally denied Key's request for fees. CP 738. The court then reconsidered and entered an order awarding all three banks (including Key) who were successful on summary judgment their attorneys' fees and costs. CP 785.

In order to avoid paying these fees, Kwiatkowski entered into a settlement agreement on January 13, 2005 (the “Settlement Agreement”), whereby the Banks agreed to forego collection of the fee awards and Kwiatkowski agreed not to pursue an appeal of this matter. CP 930-931. CP 936-946. In contravention to this agreement, Kwiatkowski later requested a continuance and asked the trial court to permit him to conduct further discovery. CP 998-1011. The court permitted him to conduct this discovery, CP 1366-1369, but it also cautioned Mr. Kwiatkowski that he

would be responsible for all fees and costs associated with this post-judgment litigation and discovery. CP 1368, lines 14-16. CP 2493. After this discovery was conducted, the Court entered another Judgment on May 19, 2006, awarding Key \$32,198.08 in reasonable attorneys' fees and costs incurred for the post-judgment litigation and discovery. CP 2399. This award was made *after* the Settlement Agreement, and, thus, was not compromised by Key in the Settlement Agreement.

IV. ARGUMENT

A. The Trial Court Correctly Enforced Key's Settlement Agreement with Kwiatkowski.

The trial court properly enforced the Settlement Agreement that resolved Kwiatkowski's claims against Key. This should be the end of the matter. This Court should affirm the dismissal of Kwiatkowski's claims against Key based on enforcement of the Settlement Agreement without needing to reach any other issue.

Whether enforcement of the Settlement Agreement is reviewed under a de novo standard or an abuse of discretion standard, the trial court should be affirmed. If the primary issue on appeal is enforcement of a settlement agreement on its terms, the trial court's decision is reviewed for abuse of discretion. *Morris v. Maks*, 69 Wn. App. 865, 868, 850 P.2d 1357 (1993). *See also Brinkerhoff v. Campbell*, 99 Wn. App. 692, 697, 994 P.2d 911 (2000) (appellate court only reviews enforcement of

settlement agreement de novo if there is: (1) a genuine dispute regarding the existence or material terms of the agreement; or (2) a genuine dispute of material fact about a defense to an agreement.). However, to the extent the motion for enforcement was resolved like a summary judgment motion would have been to address factual disputes, the appropriate standard is de novo. *Brinkerhoff v. Campbell, supra*, 99 Wn. App at 697.⁵ Here, the parties did not dispute material facts relevant to the terms of the contract, so the appropriate standard of review is abuse of discretion. There was none. Even under a de novo standard, this Court should affirm the enforcement of the Settlement Agreement

Kwiatkowski has made no showing sufficient to reverse the trial court. Key joins Seattle First/Bank of America's Brief that sets forth ample ground for affirming the enforcement of the Settlement Agreement.⁶

⁵ Bank of America's brief distinguishes *Brinkerhoff*. BoA argues that due to the material differences in the Settlement Agreement at issue from the settlement agreement at issue in *Brinkerhoff*, the decision to review de novo in *Brinkerhoff* is not controlling.

⁶ Kwiatkowski persists in arguing that the Banks had fiduciary duties to him at the time they negotiated the Settlement Agreement. See Appellant's Brief, pp. 81-82. He has no authority for that contention. After the Banks' dismissal as fiduciaries by the guardianship court and after Kwiatkowski sued them in January 2004, CP 213-221, a fiduciary relationship did not continue. Kwiatkowski relies upon *Brinkerhoff* and *Liebergessell* for his assertion that Key owed Kwiatkowski a fiduciary duty

Moreover, all alleged “Irregularities” of which Kwiatkowski complains regarding Key were of public record since early 1994 and Kwiatkowski’s attorney worked with these documents during the summary judgment proceedings in 2004.⁷ They provide no basis for failing to enforce the Settlement Agreement.

B. The Trial Court Correctly Granted Summary Judgment to Key⁸

Kwiatkowski’s claims are precluded by the discharge order of the guardianship court that released Key from all claims. Kwiatkowski’s guardian *ad litem* Parr consented to its entry. Parr did not appeal it. The matter cannot now be collaterally attacked. Moreover, Kwiatkowski

during the execution of this settlement agreement. See Appellant’s Brief, pp. 81-82, FN 261-264. These cases do not apply. In *Brinkerhoff*, the court explicitly states that the parties entering into the settlement agreement did not have a special relationship because they were in adversarial positions. *Brinkerhoff v. Campbell, supra*, 99 Wn. App. at 698. In *Liebergessell*, the Court found it was possible for a fiduciary relationship to develop as a result of the parties’ mutual interests *in a business relationship* at the time they entered into the agreement. *Liebergessell v. Evans*, 93 Wn.2d 881, 890, 613 P.2d 1170 (1980). *Liebergessell* does not apply—when the parties here entered into the Settlement Agreement they were adverse parties to a lawsuit, not business partners.

⁷ This is discussed in detail in Sections III.A and III.C, *supra*, and Section IV.C., *infra*.

⁸ The summary judgment was granted in June 2004. CP 738-740. Later, the Settlement Agreement was executed in January 2005. CP 941-943. Thus, procedurally, the summary judgments came first, followed by the motion to enforce the Settlement Agreement.

cannot defeat the summary judgment on appeal with material he never submitted to the trial court.

A trial court's grant of summary judgment is reviewed de novo. *Young v. Key Pharms.*, 112 Wn.2d 216, 770 P.2d 182 (1989). On review, the appellate court will consider only evidence and issues called to the attention of the trial court. RAP 9.12. "The purpose of this limitation is to effectuate the rule that the appellate court engages in the same inquiry as the trial court." *Washington Fed'n of State Employees, Council 28, etc., v. Office of Fin. Management*, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993). No evidence, other than that specifically presented to the trial court, may be considered on appeal. *See Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Public Hosp. Dist. No. 6*, 118 Wn.2d 1, 8-10, 820 P.2d 497 (1991) (appellate court refused to consider evidence outside the record submitted by party opposing summary judgment even though parties informed the trial court that such evidence may exist).

The trial court's order identifies the six documents that it considered during the summary judgment proceedings regarding the claims against Key. CP 3032-3034. This record establishes that Key's discharge order from the guardianship proceeding bars Kwiatkowski's collateral attack ten years after its entry and more than two and one half years after Kwiatkowski regained his capacity.

Key is positioned similarly to Seattle First/Bank of America. Key adopts the same arguments concerning the preclusive effect of the discharge orders of the guardianship court. The objectives of RCW 11.92.053 and CR 60(b) to provide finality must be heeded. A collateral attack on Key's discharge order more than ten years later must be rejected. The trial court appropriately rejected that attack. It should be affirmed.

Key urged before the trial court an alternative ground to support summary judgment. Kwiatkowski failed to present evidence to establish a prima facie case against Key. CP 687-688. An order granting summary judgment may be affirmed on any legal basis supported by the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-1, 770 P.2d 1027 (1989), cert. denied 493 U.S. 814 (1989). When a defendant points out to the court that there is an absence of evidence to support the plaintiff's case, the plaintiff has the burden on summary judgment to set forth specific facts to establish a prima facie case as to each element essential to the Plaintiff's cause of action. *Controlled Atmosphere, Inc. v. Branom Instrument Co.*, 50 Wn. App. 343, 350, 748 P.2d 686 (1988). See also *LaMon v. Butler*, supra, 112 Wn.2d at 197; *Young v. Key Pharms.*, supra, 112 Wn.2d at 225-26. Key pointed out in its moving papers that Kwiatkowski could not establish a prima facie case of breach of duty or negligence.

The records of the guardianship that were before the trial court on summary judgment presented ample evidence that Key had properly performed its duties and that Kwiatkowski's assets were intact at the conclusion of Key's service. CP 688, lines 1-12. Kwiatkowski never responded to this ground for summary judgment and never presented evidence that Key had breached a material duty to Kwiatkowski or caused damage of any sort. CP 543. *See generally* CP 539-559. Instead, Kwiatkowski asserted three facts that do not meet his burden:

- 1) Key did not file a supplemental report for the period October 1, 1993 to the date of transfer for funds to the successor guardian;
- 2) Key obtained its discharge order ex parte without notice or hearing;
- 3) Receipts for transfer of assets of U.S. Bank were not filed.

CP 543. These facts did not meet Kwiatkowski's burden to set forth a prima facie case of breach of fiduciary duty or negligence.⁹ More importantly, oral argument resolved their factual merit. Kwiatkowski

⁹ As Key briefed below, Kwiatkowski had to show proof of duty, breach injury and proximate causation. *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 433-34, 40 P.3d 1206 (2002); *Mucsi v. Graoch Assocs. Ltd. Pshp. #12*, 144 Wn.2d 847, 854, 31 P.3d 684 (2001). See CP 688. Moreover, Key argued that the negligence claim was substantively the same claim as the breach of fiduciary duty claim. CP 686-687, citing *Seely v. Gilbert*, 16 Wn.2d 611, 615, 134 P.2d 710 (1943) ("Appellant cannot evade the statute of limitations by disguising her real cause of action by the form of her complaint.") *See also* CP 4187-4191 (Key's Reply Brief on Summary Judgment).

conceded at oral argument that #1 and #3 were moot due to U.S. Bank's filing of a sworn statement detailing the assets received from Key. CP 885, line 4 to CP 887, line 7. Concessions before the trial court become the law of the case. *Vigil v. Spokane County*, 42 Wn. App. 796, 799, 714 P.2d 692 (1986). Furthermore, while Key did not dispute that the discharge order was obtained ex parte, on their face the documents showed that the parties entitled to notice and a hearing had waived such, including Kwiatkowski's guardian *ad litem* Parr, who had complete statutory authority to act on Kwiatkowski's behalf. *See In re Dill*, 60 Wn.2d 148, 150, 372 P.2d 541 (1962) ("A guardian *ad litem* has complete statutory power to represent interests of the ward."). Accordingly, this Court should sustain the summary judgment in Key's favor because Kwiatkowski failed to present a prima facie case necessary to proceed.

C. No "Irregularities" Concerning Key Warrant Overturning the Trial Court

Kwiatkowski failed to present "new" evidence of material "irregularities" to the trial court. Instead, Kwiatkowski recited facts that had been in the court record for years. Kwiatkowski was not diligent in discovering them. These facts were not material to any decision of the trial court. Kwiatkowski fails to articulate *any theory* that makes the alleged irregularities material to his claims or this appeal.

First, the evidence cannot be considered “new.” It was available from the inception of his present claims. The facts which Kwiatkowski raises in regards to Key, see Appellant’s Brief, pp. 45-47, 77-79 and 79-87, are all matters of public record:¹⁰

- 1) Kwiatkowski, the other fiduciaries, and the guardianship court were aware of Key’s classification of the Sirius Enterprises stock, which was apparent in the following public records of the guardianship court: CP 3956, ¶ 1.
- 2) Mr. Kwiatkowski, the other fiduciaries, and the court were aware of Key’s \$500,000 Guaranty against Kwiatkowski’s estate, which was apparent in the following public records of the guardianship court: CP 4599-4601, CP 4655-4561, CP 4670, CP 3949-3950, and C3955-3957.
- 3) Kwiatkowski, the other fiduciaries, and the court were aware that Key was not monitoring Kwiatkowski’s assets in January 1994, which was apparent in the following public records of the guardianship court: CP 4013-4016, CP 3928, CP 4033.
- 4) Whether Key made a particular filing in the guardianship proceedings would be of public record.
- 5) Filing dates from the guardianship proceedings would be of public record.

The facts are simply not new. Nor were they “hidden.” The court directed Key to consider Sirius Enterprises, Inc., technically an asset of the estate, while not managing it. Key did so at the court’s express direction. The

¹⁰ Key’s response to the trial court on the issue of the “irregularities” is contained at CP1602-1607 (*Key’s Supplemental Response to Plaintiff’s Report of Irregularities*) and CP 4591-4677 (*supporting declaration*).

\$500,000 guaranty can hardly be “discovered” in 2005 when numerous court documents beginning in 1991 repeatedly authorize the guaranty. The court expressly continued the guaranty when it appointed Key Successor Limited Guardian. The gap between Key’s discharge and its successor’s appointment was created by and referred to by the guardianship court. Multiple court records show the gap. *Kwiatkowski’s counsel* worked with these documents during the summary judgment proceedings in June 2004. CP 880-909; CP 1602-1607.

Washington courts routinely reject a claim of “newly discovered evidence” arising from facts in the public record.

It is generally held that the discovery of a public record material to the prosecution or defense of a cause is not within the rule of newly discovered evidence which warrants the granting of a new trial. Such matters are at all times within the reach of the complaining party, and it is because of a lack of diligence if he fails to discover them.

Starwich v. Ernst, 100 Wash. 198, 207, 170 P. 584 (1918) (emphasis added). *See also Tsubota v. Gunkel*, 58 Wn.2d 586, 364 P.2d 549 (1961) (court properly rejected receiving “new evidence” that was a matter of public record because nothing in the record established that the “evidence could not have been produced . . . by the exercise of due diligence.”) Since the alleged “irregularities” are all contained in the court records, they cannot be considered “new evidence.”

The last-minute discovery does not support Kwiatkowski's position. Kwiatkowski simply asked at the eleventh hour for files that he had not previously requested. He has made absolutely no showing that these matters were "hidden" or otherwise not discoverable earlier through ordinary diligence. The alleged "new facts" do not support any allegation of fraud or negligent misrepresentation sufficient to invalidate the Settlement Agreement. Kwiatkowski executed the Settlement Agreement in an arms-length deal while represented by counsel, specifically acknowledging the risk of new or different facts and disavowing reliance on the Banks. Kwiatkowski fails to show why this evidence would support any different outcome to the grant of summary judgment on the ground that the discharge orders bar Kwiatkowski's claims. In terms of its effect on this litigation, the "new evidence" is simply unremarkable. Kwiatkowski alleged nothing material.

The trial court was correct in its rulings. The alleged "irregularities" were not new. Also, they were irrelevant. The trial court should be affirmed.

D. The Trial Court's May 19, 2006 Attorneys' Fees and Costs Award to Key Was Not An Abuse of Discretion, and Is Supported by Two Grounds.

This Court should affirm the trial court's May 19, 2006, award of attorneys' fees and costs to Key. CP 2392-2393. This Court should

affirm the award under RCW 11.96A.150 because no abuse of discretion can be found, or under ¶ 10 of the Settlement Agreement which provides for a mandatory award. Additionally, Kwiatkowski failed to make and preserve a challenge to Key's attorneys' rates.

1. The Decision to Award Fees and Costs Should Be Affirmed.

The trial court properly awarded fees under RCW 11.96A.150.¹¹ Kwiatkowski conceded that RCW 11.96A.150 applied and that the trial court had discretion to award attorneys' fees and costs. CP 2203-2205. In briefing the issue, Kwiatkowski told the trial court, "The court can award fees in its discretion." CP 2205. See also Appellant's Brief, p. 91. Thus, the uncontested standard of review is abuse of discretion.

The trial court expressed the reasoned view that Kwiatkowski should bear the expense of his last minute attempts to revive his case by

¹¹ RCW 11.96A.150 reads: "(1) Either the superior court or the court on appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs to be paid in such amount and in such manner as the court determines to be equitable."

pursuing additional discovery and delaying enforcement of the Settlement Agreement. The trial court told Kwiatkowski's counsel,

You know, upon thinking about this, this is the lateness of the hour, I think your client should bear the cost of it because we were -- summary judgment was entered almost a year ago. This thing has been delayed and I think your client should bear the cost. This is your motion, as confusing as it is. You're getting the motion but you bear the costs.

CP 2493. The trial court permitted Kwiatkowski an additional opportunity to gather evidence with the clear provision that he would bear the attorneys' fees due to the tardiness of his request. This was a tenable basis for the award. There was no abuse of discretion.

Kwiatkowski disputes the court's decision to award fees in the face of "newly discovered" evidence "found" in 2005. Appellant's Brief, pp. 93-95. As elsewhere in Appellant's Brief, Kwiatkowski fails to articulate both why he could not have discovered this evidence earlier and why the evidence is material. This evidence was not material to resolution of the case, nor is it material to whether an award of fees and costs for the drawn-out proceedings was an abuse of discretion.

Alternatively, the Settlement Agreement provides that in any action to enforce the Agreement,

. . . the prevailing party in any such action shall be entitled to recovery from the non-prevailing party

all its reasonable attorneys' fees and costs incurred
in connection with the enforcement action.

CP 943. Thus, the attorneys' fees and costs that Key incurred attempting to enforce the Settlement Agreement and resist Kwiatkowski's demands for additional discovery are properly recoverable.¹² If a contract provides for an award of attorney's fees, the trial court has no authority to disregard the provision. RCW 4.84.330. *Singleton v. Frost*, 108 Wn.2d 723, 729, 742 P.2d 1224 (1987). The award is properly affirmed on this alternate basis.

2. Key's Attorneys' Fee Rates Were Not Challenged Below.

Kwiatkowski did not preserve for appeal whether Key's attorneys' fee rates were reasonable. It is unclear whether Kwiatkowski is now challenging the reasonableness of Key's attorneys' rates. At first he refers only to the reasonableness of Seattle First/BOA's and USB's rates. Appellate Brief, p. 95. However, on the next page he refers to "KEY and BOA". Appellate Brief, p. 96. While the latter reference may have been a mistake, Key points out that both inadequate argument on appeal and failure to raise the issue below prevents this Court from taking up the issue.

¹² In applying for its award, Key documented only such fees and costs. CP 2131-2144.

Kwiatkowski's reference to CP 2202-2224 refers to his Response on the attorney's fee issue, wherein he never disputes Key's attorneys' fee rates. See Appellate Brief, p. 95, FN 311 citing CP 2210-2214 (response relevant to Key). Kwiatkowski never challenged Key's attorneys' fee rates nor offered any evidence that they were unreasonable. On review, the appellate court must consider only evidence and issues called to the attention of the trial court. RAP 9.12. *Washington Fed'n of State Employees, Council 28, etc., v. Office of Fin. Management, supra*, 121 Wn.2d at 157.

Before the trial court Kwiatkowski *accepted* Key's rates as reasonable and performed calculations relying on these rates to arrive at "reasonable" fees based on reduced hours. CP 2211-2214.¹³ In addition, the record established that the rates were reasonable. CP 863-865. As to Key, Kwiatkowski only challenged the hours expended, which issue Kwiatkowski does not raise on appeal.

If this Court should find that an award of fees was proper under either RCW 11.96A.150 or the Settlement Agreement, it should then

¹³ Kwiatkowski did protest Key's paralegal rate. CP 2213. Key admitted that the higher rate was inadvertent and the reduction that Kwiatkowski requested was made prior to the court's award. See CP 2344.

affirm the amount of Key's fee award because Kwiatkowski has not preserved any challenge to the calculation.

E. The Trial Court Correctly Denied Kwiatkowski's Motion to Amend His Complaint.

The trial court correctly denied Kwiatkowski's untimely and futile attempt to amend his complaint in May 2006. Denial of a motion to amend is reviewed for "a manifest abuse of discretion." *McDonald v. State Farm Fire & Casualty Co.*, 119 Wn.2d 724, 737, 837 P.2d 1000 (1992). A trial court abuses its discretion if its decision was not based on tenable grounds or tenable reasons. *Layne v. Hyde*, 54 Wn. App. 125, 135, 773 P.2d 83 (1989). The Banks objected to the motion because the Settlement Agreement precluded it and because it was exceedingly tardy. CP2359-2362. CP 2346-2348. The record establishes that the trial court's denial was based on tenable grounds.

Kwiatkowski had settled his claims against the Banks. Amendment was futile. Indeed, the trial court's written order denies the amendment as to the Banks "based upon the Settlement Agreement." CP 2554. In the Settlement Agreement, Kwiatkowski released the Banks from any claims "relating to or arising from the facts and circumstances in the complaint filed in [this] Litigation and the role of any of the Defendant Banks in the Estate of Jana Kwiatkowski and the Estate of Joseph Kwiatkowski." CP 941. The trial court had enforced the Settlement

Agreement by order dated March 20, 2006, CP 1985-1986, and the Motion to Amend was made in May 2006. CP 2145-2178. Thus, Kwiatkowski had settled all claims against the Banks, and amendment as to the Banks would have been futile. *See Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 142, 937 P.2d 154 (1997), *mod.* 943 P.2d 1358 (1997) (where proposed amendment would be futile, leave to amend under CR 15 properly denied), *cert. denied* 522 U.S. 1077 (1998). The trial court had tenable grounds to deny the Motion to Amend. The trial court should be affirmed.

As to the Banks, the trial court did not reach the ground that the motion to amend was untimely. The Court of Appeals may consider alternative grounds upon which to affirm the trial court. A trial court may deny an untimely motion to amend. *Elliott v. Barnes*, 32 Wn. App. 88, 92, 645 P.2d 1136 (1982) (trial court did not err in denying motion for leave to amend as untimely after summary judgment was granted); *Ino Ino, Inc. v. City of Bellevue, supra*, 132 Wn.2d at 142 (no abuse of discretion in denying motion to amend judgment—motion was untimely and futile). Kwiatkowski's motion was made more than one year after he claims to have discovered new evidence in March 2005. CP 2145-2178. The motion was made more than twelve years after Key was discharged as limited guardian, more than four years after Kwiatkowski regained

capacity in January 2001, two years after the June 2004 summary judgments, one and one-half years after the January 2005 Settlement Agreement, and one and one half months after the trial court had enforced the Settlement Agreement in March 2006. Undue delay is supported by the record. Denial of the Motion to Amend also should be affirmed because the motion was untimely.

Finally, as set forth in detail elsewhere in this brief, the “new evidence” was not new and was not material to Kwiatkowski’s claims. Every single “discovery” alleged against Key is contained in the guardianship court records. See Section III.C., *supra*. A party alleging the discovery doctrine must have exercised due diligence and, if claiming fraudulent concealment or misrepresentation, must demonstrate “the suppression of a material fact.” *Crisman v. Crisman*, 85 Wn.App. 15, 20, 22, 931 P.2d 163 (1997), *review denied*, 132 Wn.2d 1008 (1997). Reasonable minds could not conclude that Kwiatkowski exercised due diligence when the documents have been of public record since early 1994. See *Starwich v. Ernst*, *supra*, 100 Wash. 198 (1918) (discovery of a public record not within the rule of newly discovered evidence); *Tsobota v. Gunkel*, *supra*, 58 Wn.2d 586 (1961) (where “new evidence” was in the public record, party should have discovered it with due diligence). Reasonable minds could also not conclude that Key suppressed a material

fact, when the documents were of public record and *not* material. The “discovery doctrine” is irrelevant to Kwiatkowski’s case. The trial court should be affirmed.

F. Request For Attorneys’ Fees And Costs On Appeal.

Pursuant to RAP 18.1, Key should be awarded its fees and costs for this appeal. An award of fees is appropriate under RCW 11.96A.150 and under the terms of the Settlement Agreement. CP 3006, ¶ 10. Where a private contract calls for an award of attorney’s fees to the prevailing party, courts are required to award fees. *Singleton v. Frost, supra*, 108 Wn.2d at 729. Under either RCW 11.96A.150, which has been discussed at length in the parties briefing before this Court, or Paragraph 10 of the Settlement Agreement, this Court should award fees on appeal to Key.

V. CONCLUSION

Kwiatkowski has no legitimate ground for avoiding the Settlement Agreement or pursuing a collateral attack on the guardianship orders. He also never presented sufficient facts to support his underlying claims against Key.

Designating a record more than thirteen inches thick and filing a one-hundred page brief does not an appeal make. Volume is not

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substance. Kwiatkowski fails to establish any reversible error. It is time to put the matter to rest. This Court should affirm the trial court.

RESPECTFULLY submitted this 23rd day of March, 2007.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

JOSEPH KWIATKOWSKI,

Appellant,

vs.

RALPH DREWS, JAMES FROST,
SEATTLE FIRST NATIONAL
BANK (BANK OF AMERICA),
PUGET SOUND NATIONAL
BANK (KEY TRUST COMPANY),
AND US BANK TRUST
DEPARTMENT,

Respondent.

No. 31738-9 II

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PLEASE TAKE NOTICE that on this day I caused to be served a
copy of RESPONDENT KEY TRUST COMPANY'S, aka Puget Sound
National Bank's, BRIEF on all counsel of record in the manner indicated
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