

31738-9

No. ~~3173-8-9~~ II

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

---

JOSEPH KWIATKOWSKI,

Appellant,

v.

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

Respondents.

---

U.S. BANK TRUST DEPARTMENT'S AMENDED  
RESPONSE BRIEF

---

MILLER NASH LLP  
GREG E. MONTGOMERY  
4400 Two Union Square  
601 Union Street  
Seattle, Washington 98101-2352  
(206) 622-8484

FILED  
COURT OF APPEALS  
DIVISION II  
07 MAY 22 AM 11:53  
STATE DEPARTMENT  
BY DEPUTY

**TABLE OF CONTENTS**

	<b>Page</b>
I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....	1
II. STATEMENT OF THE CASE.....	3
A. FACTUAL BACKGROUND TO THE JUNE 14, 2004 SUMMARY JUDGMENT ORDER.....	4
B. FACTUAL BACKGROUND TO THE ORDERS ENFORCING THE SETTLEMENT AGREEMENT AND AWARDED FEES AND COSTS .....	10
III. SUMMARY OF ARGUMENT .....	14
IV. ARGUMENT.....	15
A. THE TRIAL COURT’S JUNE 14, 2004 ORDER GRANTING U.S. BANK’S MOTION FOR SUMMARY JUDGMENT SHOULD BE AFFIRMED .....	15
1. Mr. Kwiatkowski’s 2004 Lawsuit is a Collateral Attack on the February 28, 1997 and April 25, 1997 Trial Court Orders.....	15
2. Mr. Kwiatkowski’s collateral attack on the 1997 orders discharging U.S. Bank cannot succeed.....	21
3. All Conditions of U.S. Bank’s Discharge Were Satisfied.....	30
4. There is no Statute of Limitations Issue .....	31
B. THIS COURT SHOULD AFFIRM THE TRIAL COURT DECISION ENFORCING THE SETTLEMENT AGREEMENT AS TO U.S. BANK .....	33

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
1. The Court and Mr. Kwiatkowski’s Guardian Ad Litem Knew of Sirius Development and U.S. Bank’s Treatment of It in 1994.....	37
2. Mr. Kwiatkowski’s Lawyers Were Aware of the Land Transfer in 2000 at the Latest .....	39
3. The Court Required U.S. Bank’s Review of Company Financial Statements Before Extending the Term of the Company’s Debt to Mr. Kwiatkowski .....	40
4. Mr. Kwiatkowski and His Lawyers Knew of the Alleged Late Filing or Non-Filing of U.S. Bank’s Third and Fourth Reports in 2004.....	41
5. Mr. Kwiatkowski Questioned the Davies’ Conflicts in 2001 .....	42
C. THIS COURT SHOULD AFFIRM THE JANUARY 6, 2006 TRIAL COURT ORDER AWARDING U.S. BANK ATTORNEYS’ FEES AND COSTS .....	44
D. U.S. BANK IS ENTITLED TO AN AWARD OF ITS FEES AND COSTS INCURRED ON APPEAL.....	46
V. CONCLUSION.....	47

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>Badgett v. Security State Bank</i> , 116 Wn.2d 563, 807 P.2d 356 (1991).....	34-35
<i>Batey v. Batey</i> , 35 Wn.2d 791 (1950).....	<i>Passim</i>
<i>Brinkerhoff v. Campbell</i> , 99 Wn. App. 692, 994 P.2d 911 (2000).....	33-34
<i>Doe v. Finch</i> , 133 Wn.2d 96 (1997) .....	32
<i>Freise v. Walker</i> , 27 Wn. App. 549, 618 P.2d 366 (1980).....	19
<i>Grady v. Dashiell</i> , 24 Wn.2d 272, 163 P.2d 922 (1945).....	27
<i>In Re Bouchat</i> , 11 Wn. App. 369, 522 P.2d 1168 (1974).....	24
<i>In Re Rudonick</i> , 76 Wn.2d 117, 456 P.2d 96 (1969).....	27-29
<i>Mathieu v. U.S. Fidelity &amp; Guaranty</i> , 158 Wash. 396, 290 P. 1003 (1930).....	25-27
<i>Sloan v. Thompson</i> , 128 Wn. App. 776, 115 P.2d 703 (2003).....	35-36
<i>State ex. rel. Patchett v. Superior Court</i> , 60 Wn.2d 784, 375 P.2d 747 (1962).....	22-24

**TABLE OF AUTHORITIES**  
**(continued)**

**Page**

**STATUTES**

RAP 10.1(g) .....	3
RAP 10.3(b) .....	1
RCW 4.16.190 .....	32
RCW 4.72.010-.090 .....	18
RCW 11.76 .....	23-24
RCW 11.28.160 .....	23
RCW 11.82.050 .....	31
RCW 11.88.040 .....	24-25, 27
RCW 11.88.120 .....	26-27
RCW 11.92.050 .....	17, 32
RCW 11.92.053 .....	25
RCW 11.96A.....	46
RCW 11.96A.150.....	45

**OTHER AUTHORITIES**

1 FREEMAN ON JUDGMENTS.....	20
-----------------------------	----

## **I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Mr. Kwiatkowski's assertion that this appeal is complex does not make it so. As concerns U.S. Bank Trust Department ("U.S. Bank"), this appeal raises only limited issues. Pursuant to RAP 10.3(b), U.S. Bank provides the following restatement of the issues, including a statement of the standard of review, and statement of the case.

1. Did the trial court err in dismissing Mr. Kwiatkowski's 2004 lawsuit against U.S. Bank on summary judgment when: (a) the February 28, 1997 order removing and discharging U.S. Bank as limited guardian of Mr. Kwiatkowski's estate followed a show cause hearing attended by Mr. Kwiatkowski and his guardian ad litem; (b) the April 25, 1997 stipulated order discharging U.S. Bank as limited guardian was signed by Mr. Kwiatkowski's guardian ad litem; and (c) Mr. Kwiatkowski did not appeal from these orders or otherwise seek relief from them. (Standard of review is de novo as factual evidence was presented by declaration alone.) (Assignments of error 5 and 6)

2. Did the trial court err in ruling that the settlement agreement signed by Mr. Kwiatkowski on January 13, 2005 was valid and enforceable as to U.S. Bank where: (a) Mr. Kwiatkowski was represented

by counsel at all times during settlement negotiations;

(b) Mr. Kwiatkowski failed to produce any evidence that, when he signed the settlement agreement, he was unaware of alleged irregularities by U.S. Bank during its limited guardianship despite being allowed to conduct discovery after his claims against U.S. Bank were dismissed; and

(c) Mr. Kwiatkowski specifically agreed to be bound by the settlement agreement notwithstanding the discovery of new facts or evidence.

(Standard of review is de novo as factual evidence was presented by declaration alone.) (Assignments of error 7 and 8)

3. Did the trial court err in awarding legal fees and costs to U.S. Bank for costs incurred defending against Mr. Kwiatkowski's efforts to avoid his settlement agreement, when the court warned Mr. Kwiatkowski's counsel that he would be responsible for legal fees if he came up with no new evidence to support his attack on the validity of his settlement agreement, Mr. Kwiatkowski, in fact, came up with no new evidence, and the settlement agreement provides for an award of attorneys' fees to the prevailing party in any dispute concerning the agreement? (Standard of review is abuse of discretion.) (Assignment of error 8.)

## **II. STATEMENT OF THE CASE**

As concerns U.S. Bank,<sup>1</sup> this appeal involves three trial court orders: (1) the June 14, 2004 summary judgment order dismissing all claims against U.S. Bank (CP 753-756); (2) the order filed June 22, 2006 adjudging the settlement agreement signed by Mr. Kwiatkowski valid and fully enforceable as to U.S. Bank (CP 2640-2644); and (3) the January 11, 2006 order awarding U.S. Bank legal costs (CP 1660-1665).

The factual record before the trial court at the time of its 2004 summary judgment decision was very limited. It is described completely in the order signed by the trial court granting U.S. Bank's motion for summary judgment. (CP 753-756)

The factual record before the trial court at the time of its order on the settlement agreement included additional information derived from limited discovery allowed plaintiff after the June 2004 summary judgment

---

<sup>1</sup> Mr. Kwiatkowski sued all three banks that served terms as limited guardian of his estate between 1986 and 1997 (CP 213-221). Many of the issues raised by this appeal are common to all three banks and, to the extent not expressly mentioned in this brief, U.S. Bank adopts the arguments presented by the other two banks on issues common to all three banks. RAP 10.1(g).

order. (CP 1366-1369) This additional information was not before the trial court at the time of its 2004 summary judgment ruling.<sup>2</sup>

**A. FACTUAL BACKGROUND TO THE JUNE 14, 2004 SUMMARY JUDGMENT ORDER.**

U.S. Bank was appointed successor limited guardian for Mr. Kwiatkowski's estate by court order dated February 18, 1994. The Order was signed by Mr. John M. Parr as guardian ad litem for Mr. Kwiatkowski. The Order appointing U.S. Bank as successor limited guardian excluded responsibility for Mr. Kwiatkowski's company, Sirius Enterprises, Inc., doing business as The Great American Herb Company.

*1. U.S. Bank Trust Department is hereby appointed as successor limited guardian of all of 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 order of this Court, which appointment was effective on September 30, 1991, and U.S. Bank Trust Department shall be held harmless from this asset.*

(CP 113-115)

---

<sup>2</sup> Throughout his brief, Mr. Kwiatkowski improperly treats the complete record before this Court as equally applicable to both orders. *See, e.g.*, Appellant's Brief at pp. 50-53.

In January 1997, Mr. Ralph Drews, as limited guardian of the person and special administrator of certain assets of Mr. Kwiatkowski, filed a petition requiring U.S. Bank to show cause why it should not be removed as limited guardian. (CP 4120-4127) In his affidavit in support of his petition, Mr. Drews recited that the assets being managed by U.S. Bank consisted entirely of marketable securities.<sup>3</sup> Mr. Drew's petition primarily contended that he could arrange for the management of these assets at a lower cost to Mr. Kwiatkowski. Mr. Drews also stated that, in his judgment, U.S. Bank was not sufficiently cooperative in allowing Mr. Kwiatkowski to pledge his personal assets to secure financing for his company. (CP 4120-4129)

The show cause hearing occurred on January 24, 1997.

Mr. Kwiatkowski and his guardian ad litem, Mr. Parr, were present. The trial court entered findings in February 1997 stating, in part, that Mr. Kwiatkowski's assets under management by U.S. Bank consisted of

---

<sup>3</sup> The pleadings filed in connection with the show cause hearing made it abundantly clear to the court and all the parties that U.S. Bank was not managing, marshalling, or reporting on any of Mr. Kwiatkowski's businesses or his interests in them. There was no objection at the time to U.S. Bank's limited estate guardianship role.

marketable securities, that U.S. Bank had done a good job in its position of limited guardian, but that cost savings could be realized by shifting responsibility for managing the marketable securities to an investment advisory firm to be retained by Mr. Drews. (CP 373-386)

The trial court entered conclusions of law and an order by which U.S. Bank was relieved of responsibility as a limited guardian effective March 3, 1997. Thereafter, U.S. Bank served merely as custodian of the assets it had been managing, subject to the direction of Mr. Drews, who became the successor limited guardian. The order further directed the performance of several ministerial tasks before discharge of U.S. Bank as follows: (1) U.S. Bank was to submit to Mr. Drews for his approval an accounting for the period from its last accounting to February 28, 1997; (2) after approval of the accounting, Mr. Drews was to file a receipt showing his receipt of all assets of the limited guardianship; and (3) after filing the receipt, Mr. Drews was to receive a summary accounting for the period between February 28, 1997 and the receipt of the limited guardianship assets. (CP 377-386)

In March 1997, U.S. Bank prepared its third report, that included an accounting for the period October 1, 1995 through September 30, 1996

and its fourth and final report, that included an accounting for the period from October 1, 1996 through February 28, 1997. (CP 407-463; 678-680; 1420-1439; CP 4831-32; 4984-5102) Both these reports, and the accompanying accountings, were furnished to Mr. Ralph Drews, the successor limited guardian, and Mr. John Parr, the guardian ad litem. Mr. Drews approved the accounting. (CP 1420-1439)

After reviewing the reports, Mr. Drews, the successor limited guardian, and Mr. Parr, the guardian ad litem, stipulated to the order approving the reports and discharging U.S. Bank as limited guardian. Mr. Parr signed the order as guardian ad litem for Mr. Kwiatkowski. That order was entered April 25, 1997. The discharge order required U.S. Bank to file receipts for the fees allowed pursuant to the order. It required Mr. Drews to file a receipt acknowledging receipt of the limited guardianship assets. (CP 387-390)

On July 10, 1997, U.S. Bank sent its attorney, Mr. Davies, receipts for the fees paid pursuant to the order discharging it as limited guardian and receipts from Mr. Drews for the assets of the limited guardianship and requested that he file these with the court. (CP 678-680; 5108-5114) For

some reason, Mr. Davies failed to immediately file the receipts. The receipts were ultimately filed in March 2000. (CP 545)

U.S. Bank also had forwarded to Mr. Drews account statements for the investment account it held in its custodial capacity after February 28, 1997. These statements reflected all transactions in the investment account until it was closed in July 1997. (CP 4079-4111)

In January 2004, Mr. Kwiatkowski sued U.S. Bank, alleging tort claims of negligence and breach of fiduciary duty, for its conduct during the period 1994 to 1997 when U.S. Bank served as a limited guardian of his estate. (CP 213-221) U.S. Bank filed its motion for summary judgment on April 30, 2004. (CP 667-677)

On May 24, 2004, Mr. Kwiatkowski filed his response to U.S. Bank's motion for summary judgment. (CP 706-730) The response took the form of an opposition to U.S. Bank's motion, combined with a motion to set aside the February 28, 1997 order on the show cause hearing and the April 25, 1997 stipulated order discharging U.S. Bank. Mr. Kwiatkowski did not propound any discovery to U.S. Bank. All pleadings were based on documents available to all parties. (CP 706-730)

On June 14, 2004, the trial court entered its order granting U.S. Bank's motion for summary judgment. (CP 753-756)<sup>4</sup> U.S. Bank then moved for reconsideration of the trial court's oral statement that it was not inclined to grant U.S. Bank's request for an award of attorneys' fees and costs. (CP 741-752) On July 7, 2004, the trial court granted U.S. Bank's motion for reconsideration and ordered that Mr. Kwiatkowski pay legal fees and costs to U.S. Bank, as well as the other bank defendants, in an amount to be determined at a hearing set for August 20, 2004. (CP 765-790)

On or about July 29, 2004, U.S. Bank submitted its fee petition, seeking slightly more than \$18,000 in costs and fees. (CP 827-845; 791-826) The other two bank defendants sought a total of an additional \$46,000 in costs and fees. (CP 860-862; 846-855; 863-877; 856-859) A hearing on these fee petitions was set for August 20, 2004. However, the hearing was taken off the court calendar as the parties entered into

---

<sup>4</sup> In granting U.S. Bank's summary judgment motion, the trial court necessarily denied Mr. Kwiatkowski's motion to vacate the two 1997 orders discharging U.S. Bank. (CP 779-784) Both motions turned on whether the 1997 orders were subject to attack some seven years after entry.

settlement negotiation intended to trade the fee award for an agreed end to the litigation. (CP 4194-4216)

**B. FACTUAL BACKGROUND TO THE ORDERS ENFORCING THE SETTLEMENT AGREEMENT AND AWARDING FEES AND COSTS.**

On January 13, 2005, after months of negotiations among counsel, Mr. Kwiatkowski signed a settlement agreement with U.S. Bank and the other two bank defendants. (CP 936-967) The essence of the agreement was that the three bank defendants waived their rights to any fee award pursuant to the July 7, 2004 trial court order and Mr. Kwiatkowski waived any appeal or other appellate review of the trial court orders dismissing his claims against the three bank defendants. To implement this agreement, Mr. Kwiatkowski further agreed to sign, and allow to be filed, a stipulation for dismissal with prejudice of his claims against the three bank defendants. (CP 936-967)

After the settlement agreement was fully executed, Mr. Kwiatkowski declined to sign the stipulation and order of dismissal. (CP 936-967) The three bank defendants filed a joint motion seeking enforcement of the settlement agreement. (CP 929-935) In response, Mr. Kwiatkowski requested a continuance of the motion and an order allowing “discovery”

to determine the extent of the banks' involvement with the businesses in which he was involved. (CP 998-1011) These motions were presented to the trial court on June 10, 2005. In the end, the trial court allowed Mr. Kwiatkowski "discovery" of bank files and required that Mr. Kwiatkowski then return to court to present whatever he discovered. (CP 1366-1369)

In September 2005, Mr. Kwiatkowski filed pleadings in which he recounted alleged irregularities he claimed were unknown to him at the time of the settlement agreement. He contended this "newly discovered" evidence justified setting aside his settlement agreement. (CP 1301-1324) As identified in his pleadings, much of the alleged "newly discovered" evidence of U.S. Bank's irregularities consists of the alleged failure of U.S. Bank to file or to timely file materials with the court during its tenure as limited guardian between 1994 and 1997. Included within this category of "newly discovered" irregularities are the following alleged failures to file:

1. A document establishing receipt by U.S. Bank of the net assets of the guardianship plus interest since September 30, 1993.

2. A Key Bank accounting for the period November 1, 1993 to March 4, 1994.

3. The Third and Fourth U.S. Bank limited guardianship reports.

4. A receipt from the successor limited guardian to U.S. Bank reflecting receipt of the limited guardianship assets.

5. An approval by the successor limited guardian to U.S. Bank of the updated accounting by U.S. Bank.

Beyond the “newly discovered” failure to file “irregularities,” Mr. Kwiatkowski alleges four other “newly discovered” irregularities:

(1) U.S. Bank failed to marshal and report on Mr. Kwiatkowski’s interest in Sirius Development, Inc.

(2) U.S. Bank did not report on the transfer of real property from Sirius Development to one of its shareholders.

(3) U.S. Bank actual did get combined financial statements for all businesses in which Mr. Kwiatkowski had an interest including Sirius Enterprises and Sirius Development even though the reports filed by U.S. Bank recited that U.S. Bank did not receive such reports.

(4) The Davies law firm, that represented all three limited guardians, had apparent conflicts of interest.

(CP 1032-1120)

In response, U.S. Bank pointed out that most of the alleged “newly discovered” irregularities, relied on to justify avoidance of the settlement agreement, actually had been raised by Mr. Kwiatkowski’s former counsel in response to U.S. Bank’s motion for summary judgment. Those alleged irregularities not raised before the settlement agreement were either known by Mr. Kwiatkowski’s lawyers or other representatives or readily apparent from public records. U.S. Bank sought an order from the trial court that the settlement agreement was valid and enforceable as to U.S. Bank. (CP 1325-1335)

At the conclusion of oral argument on these motions on September 23, 2005, the trial court orally ruled that the settlement agreement was valid and enforceable and that the banks were entitled to recover attorneys’ fees and costs incurred in responding to Mr. Kwiatkowski’s motion for continuance. Mr. Kwiatkowski then sought reconsideration of both the fee award and the substantive ruling that the settlement agreement was valid and enforceable. (CP 1387-1400)

In his motion for reconsideration of the ruling declaring the settlement agreement valid and enforceable, Mr. Kwiatkowski escalated his rhetoric, claiming that U.S. Bank and counsel had misrepresented and

withheld information from him and from the court. (CP 1387-1400) U.S. Bank once again addressed the specific factual underpinnings of his allegations in detail, providing the trial court with specific documents refuting Mr. Kwiatkowski's claims. (CP 1420-1427) The trial court declared at the conclusion of oral argument on November 7, 2005 that the settlement agreement was valid and enforceable as to U.S. Bank. Thereafter, U.S. Bank was no longer a party to the trial court proceedings. An order reflecting this ruling was entered on June 22, 2006. (CP 2640-2644)

### **III. SUMMARY OF ARGUMENT**

The trial court's June 14, 2004 order granting U.S. Bank's motion for summary judgment should be affirmed. Mr. Kwiatkowski's 2004 claims against U.S. Bank were an impermissible attempt to collaterally attack the two 1997 final orders discharging U.S. Bank as the limited guardian of Mr. Kwiatkowski's estate.

The trial court's order of June 22, 2006 declaring the settlement agreement valid and enforceable as to U.S. Bank should be affirmed. U.S. Bank established that all the factual information Mr. Kwiatkowski identified as newly discovered was known to Mr. Kwiatkowski, his

attorneys, and the court before Mr. Kwiatkowski signed his settlement agreement.

The trial court's January 11, 2006 order awarding U.S. Bank legal fees and costs incurred in responding to Mr. Kwiatkowski's efforts to avoid his settlement agreement should be affirmed. (CP 1660-1665) The trial court made it very clear that, if Mr. Kwiatkowski came up empty in his quest to discover information that would justify his avoidance of his settlement agreement, he would be liable to U.S. Bank for the legal fees and costs it incurred in responding to this quest. In addition, the settlement agreement provides for an award of fees to the prevailing party in any action arising out of the agreement.

#### **IV. ARGUMENT**

##### **A. THE TRIAL COURT'S JUNE 14, 2004 ORDER GRANTING U.S. BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD BE AFFIRMED.**

1. Mr. Kwiatkowski's 2004 Lawsuit is a Collateral Attack on the February 28, 1997 and April 25, 1997 Trial Court Orders.

Mr. Kwiatkowski's 2004 lawsuit is an effort to hold U.S. Bank liable for alleged irregularities occurring during its tenure as limited

guardian of his estate from 1994 to 1997.<sup>5</sup> Mr. Kwiatkowski claims that U.S. Bank's conduct during its tenure as limited guardian was negligent and breached fiduciary duties to him. He claims that orders entered during U.S. Bank's tenure were improper. (CP 213-221)

However, in 1997, in two separate orders, the trial court discharged U.S. Bank as limited guardian and approved its final account. (CP 377-379; 387-390) As the court stated in *Batey v. Batey*, 35 Wn.2d 791, 796 (1950):

*The order of a probate court approving the guardian's final account is a final judgment and is entitled to the same consideration as any final judgment entered by the superior court.*

Orders entered during the course of a guardianship, as well as the conduct of the guardian in general, are assumed to have been approved in the order approving the final account and discharging the guardian. Once the order approving the final account and discharging the guardian is

---

<sup>5</sup> The evidence is undisputed that Mr. Kwiatkowski suffered no losses with respect to the limited assets managed by U.S. Bank in its capacity as limited guardian. The value of the assets transferred to U.S. Bank at the inception of its tenure as limited guardian was \$2,232,240.78. During its tenure as limited guardian, U.S. Bank approved disbursements exceeding \$300,000. At the end of its tenure, U.S. Bank transferred assets valued at over \$2,550,000 to the successor limited guardian. (CP 4112-4119)

entered, interim orders and guardian conduct may only be reached if the order approving the final account can be vacated or avoided. *Batey, supra*, pp. 795-96.

In *Batey*, after the court entered an order approving the final account and discharging the guardian, the ward sought to invalidate orders entered during the course of the guardian's tenure and to recover losses due to the guardian's alleged negligence. The court's response is equally applicable here.

*We must assume that the disbursement of these three items by the guardian was approved by the probate court in the order approving the final account and may not now be questioned unless that order is subject to attack in this action.*

*The claim of appellant that the guardian was negligent in not taking into his possession and control the articles of personal property, alleged to be of the value of \$1,275 under the circumstances alleged in the amended complaint, is also a matter which could have been and should have been litigated at the time the probate court entered its order approving the guardian's final account and is likewise res judicata unless that order is subject to attack in this proceeding.<sup>6</sup>*

---

<sup>6</sup> This concept of finality of interim orders has been codified in RCW 11.92.050. Under this statute, when a guardian ad litem has been approved for the ward, as was the case here, interim orders are final and binding on the ward, subject to a (FOOTNOTE CONT'D)

*Batey, supra*, at 795-796.

As in *Batey*, Mr. Kwiatkowski argues that improper orders were entered during the course of U.S. Bank's tenure as limited guardian and that U.S. Bank failed to marshal and monitor Mr. Kwiatkowski's businesses assets of the limited guardianship. However, also as in *Batey*, Mr. Kwiatkowski did not appeal from the final judgment entered with respect to U.S. Bank in 1997 nor did he seek to directly attack the judgment under CR 60 or RCW 4.72.010-.090. Therefore, Mr. Kwiatkowski can only attack the 1997 orders collaterally, which is what he attempts in his 2004 lawsuit.

*A collateral attack is an attempt to impeach the judgment by "matters dehors the record, in an action other than that in which it was rendered; an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it.... In other words, if the action or proceeding*

---

right of appeal as with any final order. ". . . provided that at the time of final account of said guardian or limited guardian . . . any such interim order may be challenged by the incapacitated person on the ground of fraud."

Mr. Kwiatkowski did not challenge any interim orders entered during U.S. Bank's tenure as limited guardian by appeal or otherwise. Nor did Mr. Kwiatkowski oppose the order approving U.S. Bank's final account on the ground of fraud. Such a challenge, if made, would have been fruitless as evidenced by the trial court's conclusion following the show cause hearing that U.S. Bank had done a good job as limited guardian. (CP 373-376)

*has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral.*

*Batey v. Batey*, 35 Wn.2d 791, 798 (1950), quoting from 34 C.J. 521, § 827.

The basis on which a final judgment may be attacked collaterally is extremely limited. It is not enough to argue that mistakes were made in the proceedings leading to the order, or that entry of the order was incorrect. The trial court must have lacked jurisdiction over the subject matter, or the parties, or otherwise lacked the inherent power to render the judgment.

*An order which is not absolutely void, but merely erroneous is not subject to collateral attack.*

*Freise v. Walker*, 27 Wn. App. 549, 553, 618 P.2d 366 (1980).

That is, collateral attack upon a judgment is only permitted when the judgment was procured by fraud that goes to the very jurisdiction of the court rendering the judgment.

*The rule is generally stated that a final judgment of a court of competent jurisdiction is not subject to attack in another judicial proceeding except for fraud. This statement of the rule should be made more explicit by specifying the character of fraud which will justify a collateral attack on a final judgment. It is only where the fraud practiced by the*

*successful party goes to the very jurisdiction of the court which rendered the judgment that the judgment is subject to collateral attack.*

*Batey, supra*, at 798.

Mistake, collusion, perjury, or fraud not affecting the court's jurisdiction committed in the course of the proceeding that resulted in the judgment will not support a collateral attack on a judgment.

*A party to a judgment feeling himself aggrieved thereby may, in a proper case, either move that it be vacated, or prosecute an appeal or writ of error, or maintain a suit in equity to enjoin its enforcement. These, unless the judgment is void on its face, are the only remedies open to him, and if he resorts to neither, or resorting to any or all he is denied relief, he cannot avoid the judgment, when offered in evidence against him, by proving that it ought not to have been pronounced, and was procured by fraud, mistake, perjury or collusion, or through some agreement entered into by the prevailing party, and which he neglected or refused to perform. A party against whom a fraudulent judgment has been rendered may not ignore the judgment, which is fair upon its face, for an indefinite period, and successfully defeat the process of the court whenever put in operation against him without any affirmative action on his part to have the judgment declared invalid.*

*Batey, supra*, at 800, quoting from 1 FREEMAN ON JUDGMENTS (5<sup>th</sup> ed.) 661, § 331.

2. Mr. Kwiatkowski's collateral attack on the 1997 orders discharging U.S. Bank cannot succeed.

Mr. Kwiatkowski summarizes his argument that this Court should reverse the trial court order granting U.S. Bank's summary judgment motion as follows:

*Relief. The summary judgment should be vacated because there are issues of material fact as well as procedural irregularity of the entry of USB's final order. The order is void for failure to follow statutory procedure and therefore, the court's resultant subject matter jurisdiction remains disputed. Additionally, USB failed to disclose material facts indicating breaches of fiduciary duty and negligence disclosed in 2005. USB does not have a basis for claiming the statute of limitations has run because their final order is void based upon improper notice, breaches of fiduciary duty and disregard of statutory procedure.*

Brief of Appellant, pp. 52-53.

Based on the authority discussed above, Mr. Kwiatkowski's allegations of U.S. Bank's negligence, breach of fiduciary duties, and failure to disclose material facts during its tenure as limited guardian, even if true, which they are not, cannot support a collateral attack on the trial court orders discharging U.S. Bank. Mr. Kwiatkowski can collaterally attack the 1997 orders discharging U.S. Bank only on the basis that the trial court lacked jurisdiction to enter these orders.

- a. Mr. Kwiatkowski's jurisdictional argument improperly confuses discharge of a guardian with termination of a guardianship.

Mr. Kwiatkowski's jurisdictional challenge to the 1997 orders discharging U.S. Bank is premised largely on the assumption that procedures applicable to the termination of a guardianship are also applicable to the discharge of a guardian during the course of an ongoing guardianship. This is a fallacious assumption, as is clear from the authority cited by Mr. Kwiatkowski.

For example, Mr. Kwiatkowski repeatedly asserts that U.S. Bank demonstrated "an utter disregard for statutory procedures" in obtaining the final orders discharging it as Mr. Kwiatkowski's limited guardian. This phrase comes from *State ex. rel. Patchett v. Superior Court*, 60 Wn.2d 784, 375 P.2d 747 (1962).

In *Patchett*, the court was removing a personal representative upon final closure of an estate. U.S. Bank's discharge orders were issued in the context of merely replacing U.S. Bank with a different limited guardian during the course of the guardianship. The court in *Patchett* explicitly recognized the distinction between the removal and replacement of a

personal representative during estate administration, and the discharge of a personal representative when closing an estate.

*We are aware of the distinction between the jurisdiction of a court to discharge a personal representative during the course of administration as opposed to discharge at the time of final settlement. The probate court under RCW 11.28.160 has the jurisdiction to discharge a personal representative for any cause it deems sufficient during the course of administration, whereas jurisdiction for discharge of a personal representative at the time of final settlement of the estate is exclusively under RCW Chapter 11.76.*

*Patchett*, 60 Wn.2d at 797.

Because the removal of the administrator in *Patchett* occurred as part of an order purporting to finally settle and close the estate, the estate administratrix was obligated to comply with specific statutory provisions, such as providing notice to the beneficiaries and preparing a final account. The administratrix failed to comply with any of the statutorily required steps to close an estate. As a result, the court voided the order discharging the administratrix and closing the estate.

*[I]t is clear from the language of the set aside order that this was not a removal for cause but for a discharge, at the time of final settlement, which brings the probate court under the exclusive procedure provided for in RCW Chapter 11.76. [T]here has been an utter disregard of the statutory procedure for the final settlement of the estate and*

*the discharge of the personal representative. In the instant case the statute has been disregarded in the failure of the administratrix (1) to file a final report and petition for distribution; (2) to publish notice of hearing commencing 25 days prior to the day to be fixed therefor; (3) to mail notice of such hearing to the heirs or devisees as required by statute, as well as failure to comply in other particulars. RCW Chapter 11.76, supra. The probate court acted outside its jurisdiction in failing to comply with the statutory procedure. (Emphasis Added)*

*Id.*

*Patchett* provides no support for Mr. Kwiatkowski's argument that the orders discharging U.S. Bank as limited guardian and appointing Mr. Drews as successor limited guardian were void for lack of trial court jurisdiction.

Mr. Kwiatkowski also relies on *In Re Bouchat*, 11 Wn. App. 369, 522 P.2d 1168 (1974). Mr. Kwiatkowski again fails to appreciate the factual differences between *Bouchat* and his situation. In *Bouchat*, the court never acquired jurisdiction because the guardianship was initiated without any notice to the ward or anyone representing his interests.

- b. RCW 11.88.040 does not apply to the orders discharging U.S. Bank.

Mr. Kwiatkowski contends the orders discharging U.S. Bank are void and subject to collateral attack because compliance with the

provisions of RCW 11.88.040 is jurisdictional for entry of orders discharging guardians. (Appellant's Brief at pp. 27-28) Mr. Kwiatkowski is incorrect. RCW 11.88.040 does not apply to the orders discharging U.S. Bank.

RCW 11.88.040 addresses the initiation of a guardianship. It has relevance to the termination of a guardianship because RCW 11.92.053 adopts the procedures of RCW 11.84.040 for the termination of a guardianship. The orders discharging U.S. Bank neither initiated nor terminated a guardianship. They simply removed U.S. Bank as limited guardian in favor of Mr. Drews who was appointed successor limited guardian. (CP 373-386)

*Mathieu v. U.S. Fidelity & Guaranty*, 158 Wash. 396, 290 P. 1003 (1930), clarifies the statutory procedures for appointing a successor guardian after a hearing upon the final account and removal of a former guardian. In *Mathieu*, the ward contended that the order appointing his successor guardian was void because he did not receive proper notice. *Mathieu*, 158 Wash. at 399. The court disagreed, stating that the ward's contention was based on the false assumption that the guardian's appointment "should have been made in the manner which the statute

required for the appointment of the original guardian.” *Mathieu*,

158 Wash. at 399. The court explained

*Where an application for the appointment of a guardian . . . has once been made and notice duly given, no further application or notice is required to warrant the appointment of a successor guardian to the first appointment.*

*Mathieu*, 158 Wash. at 399 (quoting 28 C.J., p. 1109, Sect. 169).

While the statutes governing guardianships have changed since *Mathieu*, the distinction between the procedures for appointment of an original guardian and appointing a successor guardian remains. RCW 11.88.120 (1) states

*At any time after the establishment of a guardianship or appointment of a guardian, the court may, upon the death of the guardian or limited guardian, or for other good reason, modify or terminate the guardianship or replace the guardian or limited guardian.”*

Under RCW 11.88.120(2), any applicant who seeks removal of a limited guardian and is represented by counsel shall move for an order to show cause why the relief should not be granted. This, of course, is exactly what occurred with respect to U.S. Bank. In January 1997, Mr. Drews filed a motion for a show cause hearing that resulted in an order discharging U.S. Bank. (CP 4120-4129) Like the ward in *Mathieu*,

Mr. Kwiatkowski erroneously cites RCW 11.88.040 as his basis for challenging the notice provided to him when U.S. Bank was discharged and a successor appointed. *See* Brief of Appellant at 28. However, as in the case of *Mathieu*, no special statutory notice was required to discharge the original guardian and appoint a successor. The procedures required under RCW 11.88.120 were followed and the court had jurisdiction to enter the order on the show cause hearing discharging U.S. Bank.

- c. The orders discharging U.S. Bank were not entered ex parte.

Mr. Kwiatkowski appears to argue that the two orders discharging U.S. Bank were entered ex parte and, therefore, void and subject to collateral attack. He appears to cite *In Re Rudonick*, 76 Wn.2d 117, 456 P.2d 96 (1969) and *Grady v. Dashiell*, 24 Wn.2d 272, 163 P.2d 922 (1945) in support of this contention.

While the cases cited by Mr. Kwiatkowski may support the proposition that guardianship orders entered ex parte are void, the orders discharging U.S. Bank were not entered ex parte. In *Grady*, the court noted that the orders were entered by the court “. . . wholly without any representation whatever . . .” of the ward. *Grady*, 24 Wn.2d at 287. In

*Rudonick*, the court noted that the “. . . ward was not represented by a guardian ad litem at the hearings on any of these reports.” *In Re Rudonick*, 76 Wn.2d at 120. However, *Rudonick* acknowledged that final orders entered where a guardian ad litem has been appointed to represent the ward are res judicata because they are not ex parte orders.

Mr. Kwiatkowski was either present, or represented, or both, at the entry of each of the two orders discharging U.S. Bank. The February 28, 1997 order discharging U.S. Bank, entered after the completion of a show cause hearing at which Mr. Parr and Mr. Kwiatkowski were present, recites that both Mr. Kwiatkowski and his guardian ad litem were present when the order was entered. In addition, Mr. Parr, as guardian ad litem, testified at the show cause hearing. The February 28, 1997 order was not ex parte. Mr. Kwiatkowski had notice of, and appeared at, the hearing on the order. He was represented by a guardian ad litem as well.

(CP 373-386)

The April 25, 1997 order discharging U.S. Bank recites that Mr. Parr, the guardian ad litem, reviewed and approved the reports filed by U.S. Bank and stipulated that the reports should be approved.

Additionally, Mr. Parr signed the order discharging U.S. Bank. This order was not entered ex parte. (CP 387-390)

d. The guardian ad litem received adequate notice.

For the orders discharging U.S. Bank to be final, neither statute nor common law requires notice to the ward where the ward's guardian ad litem receives sufficient notice. In *In Re Rudonick*, 76 Wn.2d 117, 127-28, 456 P.2d 117 (1969), the ward challenged the order approving the final accounting in her guardianship for lack of notice of the final hearing. The court explained

*although no notice... was given to the ward, the guardian ad litem was given notice and appeared. Under these circumstances [the court does] not consider actual notice to a ward a prerequisite to the res judicata effect of the hearing. Thus the order from that hearing is res judicata and may not be collaterally attacked.*

*Rudonick*, 76 Wn.2d at 128.

In the present case, the guardian ad litem, Mr. Parr, as well as Mr. Kwiatkowski, received notice and were present at the hearing that resulted in the February 28, 1997 order discharging U.S. Bank. (CP 373-386) The guardian ad litem had notice of, and signed off on, the stipulated order of April 25, 1997 discharging U.S. Bank. (CP 387-390) Since the guardian ad litem had notice of this second order, notice to

Mr. Kwiatkowski was not required. Both orders were final, res judicata and not subject to collateral attack.

3. All Conditions of U.S. Bank's Discharge Were Satisfied.

The February 28, 1997 order on the show cause hearing discharging U.S. Bank required U.S. Bank to submit an accounting to Mr. Drews for the period to February 28, 1997. (CP 377-386) U.S. Bank provided these accountings in its Third Annual Report and in its Fourth and Final Report. Both these reports were provided to and approved by Mr. Drews and the Fourth Report was filed with the court. (CP 387-390; 407-463; 4120-4149)

After approving the accounting through February 28, 1997, Mr. Drews was to file receipts with the court reflecting his receipt of the assets of the limited guardianship. These receipts were prepared in July 1997 and filed with the court in 2000. (CP 545; 678-680; 5108-5114)

Finally, after filing the receipts, Mr. Drews was to receive a summary accounting for the period between February 28, 1997 and the time of the receipt of the assets. This summary accounting was provided in September 1997. (CP 4079-4111; 4150-4184)

All of the conditions on the February 28, 1997 order

discharging U.S. Bank were fulfilled. The same is true of the stipulated order discharging U.S. Bank entered April 25, 1997. That order required U.S. Bank to file receipts for the fees it paid pursuant to the order and required Mr. Drews to file receipts indicating receipt of the assets of the limited guardianship. All these receipts were prepared in June and July 1997 and filed by counsel for U.S. Bank in 2000. (CP 545; 678-680; 5108-5114)

4. There is no Statute of Limitations Issue.

The trial court entered two separate orders discharging U.S. Bank as limited guardian of Mr. Kwiatkowski's estate. For the reasons stated above, both these orders are final orders and are *res judicata* to issues that could have been raised regarding U.S. Bank's performance as a limited guardian. By statute, Mr. Kwiatkowski could have challenged any interim order entered during U.S. Bank's tenure as guardian by appeal from the interim order or on the basis of fraud at the time of the final accounting. RCW 11.82.050. Mr. Kwiatkowski neither challenged the conduct of U.S. Bank at the time the interim orders were entered nor at the time of the final accounting.

Mr. Kwiatkowski's statute of limitations argument misses the distinction between claims against a discharged guardian and claims against third parties to the guardianship. *See, e.g., Young v. Kay Pharmaceuticals*, 112 Wn.2d, 216 (1989) (statute of limitations on medical malpractice/products liability claim tolled by incapacity despite appointment of guardian ad litem); *Doe v. Finch*, 133 Wn.2d 96 (1997) (statute of limitations tolled on malpractice action by concealment of cause of action).

The statutory scheme relating to a ward's ability to challenge action of a guardian is completely different from RCW 4.16.190. RCW 11.92.050 expressly provides that the presence of a guardian ad litem renders interim orders final and binding, subject only to appeal. The point of the orders discharging U.S. Bank is that the discharge acts to bar claims arising out of the conduct of the guardian absent a successful appeal from the discharge order. For this reason, the statute of limitations tolling arguments raised by Mr. Kwiatkowski, including the discovery rule, fraudulent concealment, or continued incapacity, are not applicable.

Finally, even if this court were to conclude that Mr. Kwiatkowski's attacks on the final orders discharging U.S. Bank had some merit, all these

claims have been resolved through a binding and enforceable settlement agreement.

**B. THIS COURT SHOULD AFFIRM THE TRIAL COURT DECISION ENFORCING THE SETTLEMENT AGREEMENT AS TO U.S. BANK.**

Mr. Kwiatkowski contends that the settlement agreement is void because it was based on misrepresentation or fraud and its enforcement is precluded by the principles of equitable estoppel and the Rules of Professional Conduct, as a matter of public policy. (Appellant's Brief at p. 81) Mr. Kwiatkowski's contentions are not supported by the legal authority he cites. Moreover, as a factual matter, there was no fraud or misrepresentation practiced by U.S. Bank in obtaining the settlement agreement.

Curiously, Mr. Kwiatkowski cites *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 994 P.2d 911 (2000) as support for his assertion that U.S. Bank had an affirmative disclosure duty to him in connection with the negotiation of the settlement agreement. In fact, in the context of settlement negotiations, the court in *Brinkerhoff* stated just the opposite. Referring to the language Mr. Kwiatkowski quoted from this decision, the court went on to state:

*The relationship between Brinkerhoff and Campbell, and the relationship between their respective attorneys, did not fail [sic] into any of these categories. The relationship was adversarial, not one of trust or reliance. In the absence of an inquiry, Campbell and his agents had no affirmative duty to disclose Campbell's policy limits, even after they became aware that disclosure of the limits would correct Brinkerhoff's mistake as to a basic assumption on which he agreed to accept less than a full recovery from the tortfeasor.*

*Brinkerhoff, supra*, p. 698.

Much the same may be said of Mr. Kwiatkowski's good faith and fair dealing argument. Contrary to Mr. Kwiatkowski's argument, *Badgett v. Security State Bank*, 116 Wn.2d 563, 807 P.2d 356 (1991) does not stand for the proposition that there is some free-floating obligation of good faith and fair dealing that attaches itself to contract negotiations. In fact, the court in *Badgett* specifically rejected the notion of some general obligation of good faith and fair dealing in connection with contract negotiations. Instead, the court held that this obligation arose only in connection with the specific terms of the contract agreed to by the parties.

*However, the duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract. . . . Nor does it "inject substantive terms into the parties' contract". Rather, it requires only that the parties perform in good faith the obligations imposed by their agreement.*

*Badgett, supra*, p. 569.

Finally, Mr. Kwiatkowski's argument that the settlement agreement is voidable for fraudulent concealment also is not supported by the authority he cites. Mr. Kwiatkowski sued U.S. Bank in January 2004 alleging negligence and breach of fiduciary duties during its tenure as limited guardian of his estate from 1994 to 1997. (CP 213-221) Having filed his lawsuit, Mr. Kwiatkowski had at his disposal all the discovery tools provided by the civil rules. All the evidence, allegedly only discovered after he executed the settlement agreement, was readily discoverable by Mr. Kwiatkowski for months before his claims were dismissed on summary judgment. He had only to use the discovery tools available to him to look at all this evidence, but he chose not to look.

This is a significantly different factual situation from that presented in *Sloan v. Thompson*, 128 Wn. App. 776, 115 P.2d 703 (2003), the authority upon which Mr. Kwiatkowski relies. In *Sloan*, the court declined to enforce an "as-is" provision in a real estate purchase agreement because the seller knew of material defects in the home and the defects were concealed as to the buyer, i.e., neither known by the buyer nor discoverable by reasonable inspection. As the court observed in

*Sloan*, discovery of the framing defects was not possible without removing the sheetrock or plywood covering.

No such impediments prevented Mr. Kwiatkowski from discovering all the evidence on which he now relies for his argument that the settlement agreement is unenforceable based on fraudulent concealment. Much of the “newly discovered” evidence on which Mr. Kwiatkowski relies was a matter of public record. Furthermore, as reflected by U.S. Bank’s response to the discovery allowed after Mr. Kwiatkowski’s claims were dismissed, all he had to do was avail himself of the standard discovery tools available under the court rules and the documents upon which he now relies for his fraudulent concealment argument would have been provided.

More importantly, however, is the undeniable fact that all of the alleged irregularities upon which Mr. Kwiatkowski relies in his effort to avoid his settlement agreement were known to him, his lawyers, his guardian ad litem, and the court well before his claims were dismissed on summary judgment. Nothing new was revealed as a result of the discovery allowed in connection with Mr. Kwiatkowski’s challenge to the settlement agreement.

Mr. Kwiatkowski appears to identify alleged U.S. Bank omissions and/or concealments at pp. 48-52 and again at p. 85 of his brief.

Mr. Kwiatkowski's claims that U.S. Bank concealed information from him or the court or misrepresented facts to him or the court are demonstrably false based on the court records and pleadings and correspondence prepared by his lawyers.

1. The Court and Mr. Kwiatkowski's Guardian Ad Litem Knew of Sirius Development and U.S. Bank's Treatment of It in 1994.

Mr. Kwiatkowski alleges that U.S. Bank failed to disclose the formation of Sirius Development and his interest in this new company and failed to report on it as an asset of his estate. This is nonsense.

In its capacity as limited guardian of Mr. Kwiatkowski's estate, U.S. Bank sought court approval for a guarantee by Mr. Kwiatkowski of a portion of an SBA loan to Sirius Development to be used to purchase land and construct an office building to be used by Sirius Enterprises. In pleading filed in 1994, U.S. Bank described the situation to the court as follows:

*The Herb Company has improved its financial position and has decided to move to Elma, Washington in a new facility being built by Sirius Development Co., Inc., a corporation*

*comprised of Joseph Kwiatkowski, (40 percent), Douglas Grove, president of the Herb Company (42.84 percent), and Helen Armitage, Controller of the Herb Company, (17.16 percent). The new building and land is worth approximately \$850,000.00, \$720,000.00 of which is being financed by an SBA guaranteed loan through Centennial Bank. \$130,000.00 of equity was contributed by the shareholders of Sirius Development Company, Inc. to purchase the land. The Herb Company will rent the property on a triple net lease and pay rent of approximately \$8,000.00 per month, with the SBA payment fixed at \$6,075.34 per month on a 25 year amortization. Instead of taking out the excess of rental income over loan payment, the company will be making extra payments in order to retire the loan hopefully in less than 15 years.*

...

*The net effect of the transaction is to give Mr. Kwiatkowski a 40 percent interest in the building and its profits which will accrue to his benefit over the next 15 to 20 years, improve his total net worth, as well as provided additional cash flow from the Herb Company in the form of rent.*

The court approved U.S. Bank's request in an order signed by Mr. Parr in his capacity as guardian ad litem. (CP 1420-1427; 5166-67)

It is undeniable that Mr. Kwiatkowski was aware of U.S. Bank's treatment of Sirius Development no later than May 20, 2004, or more than six months before he signed the settlement agreement, because his lawyers at the time alleged the following in a pleading:

*3. In June of 1994 U.S. Bank petitioned to allow Joe Kwiatkowski to guarantee a \$720,000.00 loan to Sirius*

*Development Co., Inc., a corporation in which Joe Kwiatkowski had a 40% ownership interest.*

*4. In July of 1994 U.S. Bank petitioned to have Joe Kwiatkowski guarantee another loan to Sirius Development, Inc., a business asset of the guardianship estate for which U.S. Bank never reported to the court. The petition requests a reduction of Joe Kwiatkowski's personal guarantee of a line of credit loan to Sirius Enterprises, Inc., another business asset which U.S. Bank does acknowledge, but does not report on fully.*

(CP 711-713)

The court and Mr. Kwiatkowski's guardian ad litem were fully aware of the status of Sirius Development, Mr. Kwiatkowski's ownership interest in it, and U.S. Bank's treatment of this asset well before Mr. Kwiatkowski signed the settlement agreement.

2. Mr. Kwiatkowski's Lawyers Were Aware of the Land Transfer in 2000 at the Latest.

Mr. Kwiatkowski claims that U.S. Bank failed to disclose the transfer of land that it noted internally. This is a reference to slightly more than four acres of land that was transferred by Sirius Development to Mr. Grove who was an officer and shareholder of Sirius Development in exchange for management services. This transfer was not hidden from anyone.

In 2000, Mr. Kwiatkowski hired the law firm of Wheeler & Associates and Mark A. Peterwell to assist him in gathering information about Sirius Enterprises, Inc. In an August 9, 2000 letter to Mr. Grove, Mr. Peterwell requested the name of the employee to whom the company granted the 4.25 acre parcel, its location, and the use being made of it. A copy of this letter went to Donna Holt, another of Mr. Kwiatkowski's lawyers directly involved in the guardianship proceedings. Mr. Peterwell got a very prompt response. In his follow-up letter of August 15, 2000, also copied to Ms. Holt, Mr. Peterwell writes:

Finally in response to item 13 you indicated Mr. Grove is the owner of the 4.25-acre parcel of property and that it is this property he is pledging to satisfy his portion of Grays Harbor Bank's request.

(CP 1420-1427; 5181)

3. The Court Required U.S. Bank's Review of Company Financial Statements Before Extending the Term of the Company's Debt to Mr. Kwiatkowski.

Mr. Kwiatkowski alleges that U.S. Bank hid the fact that it was in receipt of financial statements for his companies in contradiction to statements in its annual reports that it did not receive such statements. The fact that U.S. Bank was receiving and reviewing such financial statements was not hidden from Mr. Kwiatkowski or the court. To the contrary, in its

first report, U.S. Bank asked the court for permission to renew the promissory note executed by Sirius Enterprises in favor of Mr. Kwiatkowski based on U.S. Bank's review and approval of corporate financial statements on an annual basis. In its order approving this report, the court allowed U.S. Bank to agree to the renewal of the promissory note based on its review of company financial statements. (CP 362-364) In other words, ten years before Mr. Kwiatkowski signed his settlement agreement, court records reflected, and a court order required, that U.S. Bank review company financial statements in its role a limited guardian of Mr. Kwiatkowski's estate to determine if renewing the promissory note for the company debt to Mr. Kwiatkowski was appropriate.

4. Mr. Kwiatkowski and His Lawyers Knew of the Alleged Late Filing or Non-Filing of U.S. Bank's Third and Fourth Reports in 2004.

At various points in his brief, Mr. Kwiatkowski argues that the late filing of the Fourth and Final Report and the absence of any indication that U.S. Bank's Third Report was filed were reasons to void the settlement agreement. The simple response is the undisputed fact that Mr. Kwiatkowski was aware of these late filings or non-filings months

before he signed the settlement agreement. In his pleading filed in May 2004 in response to U.S. Bank's motion for summary judgment,

Mr. Kwiatkowski argued:

*The fourth and final account and petition for discharge of U.S. Bank was not filed until five years later.*

*The third annual report of U.S. Bank has never been filed.*

(CP 711-713)

Because Mr. Kwiatkowski was undeniably aware of any late or non-filing issue with U.S. Bank reports at the time he signed the settlement agreement, these facts, even if true, cannot be the basis for voiding the settlement agreement. Moreover, although these reports were filed late, or perhaps never filed, they were provided to and approved by both Mr. Drews and, more importantly, Mr. Parr, as guardian ad litem for Mr. Kwiatkowski. (CP 387-390; 4120-4129)

5. Mr. Kwiatkowski Questioned the Davies' Conflicts in 2001.

Arthur Davies' alleged conflicts cannot provide a basis for voiding the settlement agreement. Mr. Kwiatkowski and his lawyer were well-aware of, and complaining about, these potential conflicts years before Mr. Kwiatkowski signed the settlement agreement. In a letter dated in

2001, Ms. Holt, then Mr. Kwiatkowski's lawyer, wrote to Mr. Davies' law firm as follows:

*Joe is bothered by the fact your firm has acted in a number of capacities with regard to his personal and financial welfare: the firm represented Mr. and Mrs. Kwiatkowski in preparing powers of attorney for them prior to their eventful trip overseas; Mr. Davies represented the petitioners in Mr. Kwiatkowski's guardianship; Mr. Davies represented both the first (Seafirst Bank), second (Puget Sound National Bank/Key Bank) and third (US Bank) limited guardians of his estate. Continuously he represented Ralph Drews as guardian of Joe's person. And, despite the fact that Mr. Davies, on behalf of US Bank, opposed the appointment of Ralph Drews as successor guardian of the estate, he went on to represent Ralph upon his appointment as the next successor. From the date of their appointment, Mr. Davies represented the Special Administrators. There seems to be at least the appearance of conflicts of interest in this series of professional relationships.*

(CP 1420-1427; 5139)

The remainder of the "irregularities" relied on by Mr. Kwiatkowski are based on allegations that certain documents required to be filed by court orders were not filed or not promptly filed. As mentioned above, even if true, these allegations could not possibly constitute "newly discovered" evidence. The court order purporting to require the filing as well as the absence or delayed filing were all matters of public record

available to Mr. Kwiatkowski for years before he signed his settlement agreement.

Additionally, many of the non-filing or late filing allegations are simply incorrect. U.S. Bank's First Report as limited guardian states very clearly what assets were received from the predecessor limited guardian.

Ralph Drews, as the successor limited guardian to U.S. Bank, did sign receipts acknowledging receipt of the assets of the limited guardianship, although the filing of the receipts was delayed. Also, although perhaps not filed with the court, Ralph Drews, as successor limited guardian, did receive accountings, in the form of current account statements, for the assets of the limited guardianship through July 1997. (CP 4079-4111; 4150-4184)

**C. THIS COURT SHOULD AFFIRM THE JANUARY 6, 2006 TRIAL COURT ORDER AWARDING U.S. BANK ATTORNEYS' FEES AND COSTS.**

On or about January 11, 2006, the trial court entered an order awarding U.S. Bank \$14,625 in attorneys' fees and costs incurred in responding to Mr. Kwiatkowski's motion to continue the motion to enforce the settlement agreement, his motion for discovery, and related other hearings and motions. (CP 1660-1665) This award of legal fees was

consistent with the trial court's admonition to Mr. Kwiatkowski's attorney at the time of his continuance and post-dismissal discovery motion:

THE COURT: Let me try to -- let me proffer this as a resolution, Ms. Balsam, how much time do you think you would need; a month or two months?

MS. BALSAM: Well, if you --

THE COURT: I am just going to give you a real short leash here. You either deliver or you don't deliver but if you come up empty and no oil is discovered, the attorney fees for this fishing expedition will be borne by your client with interest, statutory interest.

(CP 4217-18; 4271-72)

It also was consistent with the order prepared by Mr. Kwiatkowski's counsel and entered on September 29, 2005 (CP 1366-1369) that provided, in part:

ORDERED, ADJUDGED, AND DECREED that Mr. Kwiatkowski should bear the cost of the continuance motion for all counsel and for costs associated with producing documents.

The trial court clearly had wide discretion to award fees and costs in this matter under RCW 11.96A.150 as well as under the terms of the Settlement Agreement that provided for an award of fees to the prevailing party in the event of a dispute regarding the Agreement. The trial court did

not abuse its discretion in awarding U.S. Bank \$14, 625 in attorneys' fees and costs for the hearings and briefing required, beginning in June 2005 and continuing through November 2005 in connection with Mr. Kwiatkowski's post-dismissal discovery and efforts to avoid his settlement agreement.

**D. U.S. BANK IS ENTITLED TO AN AWARD OF ITS FEES AND COSTS INCURRED ON APPEAL.**

Shortly after the trial court dismissed all of Mr. Kwiatkowski's claims against it, U.S. Bank tried to bring an end to this litigation by offering to give up its right to an award of legal fees and costs in exchange for Mr. Kwiatkowski's agreement to forego any appeal of the dismissal of his claims. In January 2005, Mr. Kwiatkowski agreed. (CP 936-967)

In May 2005, Mr. Kwiatkowski retained new counsel and chose to resurrect this litigation, ultimately losing again at the trial court level on the validity of the settlement agreement and now seeking relief in this Court. If the trial court decisions at issue are affirmed on appeal, U.S. Bank is entitled to an award of legal fees and costs both by the terms of the Settlement Agreement signed by Mr. Kwiatkowski more than two years ago and under the terms of RCW 11.96A. 150.

## V. CONCLUSION

It is undisputed that the two 1997 orders discharging U.S. Bank as a limited guardian were presented and entered with the knowledge and approval of Mr. Kwiatkowski's guardian ad litem. As such, they are final and binding orders.

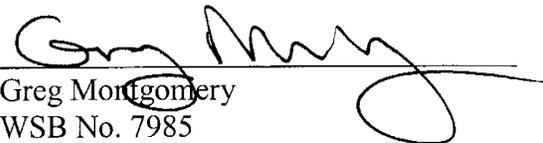
Having pursued no appeal from these final and binding orders, Mr. Kwiatkowski can only raise his tort claims against U.S. Bank for conduct occurring in the 1994 to 1997 time period, if he can collaterally attack these orders. He cannot. Mr. Kwiatkowski has failed to identify any factual or legal basis to support a claim that the trial court was without jurisdiction to enter the final and binding orders discharging U.S. Bank. This Court should affirm the trial court order dismissing all claims against U.S. Bank.

The trial court order declaring the Settlement Agreement to be valid and enforceable as to U.S. Bank is equally correct. It is factually undeniable that each alleged "irregularity" on which Mr. Kwiatkowski relies in his effort to avoid the Settlement Agreement was known to Mr. Kwiatkowski, his many lawyers, his guardian ad litem, and the court well before he signed the Settlement Agreement.

Finally, this Court should award U.S. Bank its reasonable legal fees and costs incurred on this appeal. U.S. Bank attempted in 2005 to avoid this litigation by giving up a fee award for Mr. Kwiatkowski's agreement not to appeal. In repudiation of his agreement, Mr. Kwiatkowski pursued this appeal. U.S. Bank is entitled to a fee award for this appeal.

DATED this 8<sup>th</sup> day of May, 2007.

MILLER NASH LLP

  
Greg Montgomery  
WSB No. 7985

Attorneys for Respondent  
U.S. Bank National Association

FILED  
COURT OF APPEALS  
DIVISION II

07 MAY 22 AM 11:53

No. 3173-8-9 II

STATE OF WASHINGTON  
BY Crum  
DEPUTY

**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II**

---

**JOSEPH KWIATKOWSKI,**

**Appellant,**

v.

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

**Respondents.**

---

**AFFIDAVIT OF SERVICE**

---

**MILLER NASH LLP  
GREG E. MONTGOMERY  
4400 Two Union Square  
601 Union Street  
Seattle, Washington 98101-2352  
(206) 622-8484**



Catherine W. Smith  
Edwards Sieh Smith &  
Goodfriend, P.S.  
1109 First Avenue, Suite 500  
Seattle, WA 98101-2988

Attorney for Respondents  
Drews and Frost

Kristen Kulgren  
Kristen Kulgren

SIGNED AND SWORN to (or affirmed) before me on  
May 21, 2007 by Angela M. Lewis.

Angela M. Lewis  
Angela M. Lewis Printed Name  
Notary Public Residing at Bothell, WA  
My appointment expires 4-26-2010

