

NO. 47536-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON AT TACOMA

IN THE MATTER OF THE ESTATE OF
ROBERT T. RIDLEY
Deceased.

KIMLY PROM, individually,
Petitioner,

vs.

PHILIP CARVER, as Personal Representative of the Estate of Robert
Ridley; RIVERVIEW COMMUNITY BANK, a Washington Financial
Institution; JENNA SUY and PAULLA SUY, wife and husband and their
marital community comprised thereof;
Respondents

BRIEF OF APPELLANT KIMLY PROM

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I. INTRODUCTION

This case involving multiple claims against multiple parties is before the court on Kimly Prom's appeal as a matter of right under CR 54(b) and RAP 2.2(d) of the trial court's final orders regarding two defendants in this TEDRA matter: Philip Carver, Personal Representative of the Estate of Robert Ridley and Riverview Community Bank. Proceedings at the trial court against remaining defendant, Jenna Suy, are stayed pending this appeal.

Although this case presents multiple genuine issues of material fact that impact the outcome of the litigation with respect to Mr. Ridley's estate and Riverview, the trial court shifted the burden on summary judgment, applied incorrect legal standards, and misinterpreted the law when it summarily dismissed Ms. Prom's claims against Mr. Carver in his capacity as Personal Representative of Mr. Ridley's estate and Riverview. In granting summary judgment in favor of Mr. Carver and Riverview, the trial court permitted both Mr. Carver and Riverview to raise new issues and arguments on reply and in oral argument, ignored Mr. Carver's and Riverview's concessions regarding factual issues, apparently considered the evidence presented in the light *least* favorable to Ms. Prom and may

have made credibility determinations or weighed the evidence presented, and misinterpreted the substantive law.

Then, as an apparent afterthought, the trial court applied TEDRA's attorney fee provision as if it imposed a mandatory, prevailing party standard even though it is an equitable standard. Further, Ms. Prom raised numerous objections to the reasonableness of the fees and costs requested by Mr. Carver and Riverview, which all parties anticipated would be resolved at hearing, the trial court continued the hearing for two weeks, but ultimately decided the amount of its attorney fee awards without hearing and without conducting any analysis on the record. It is not clear from the record that the trial court ever conducted a *lodestar* analysis and the trial court's award of attorney fees and costs to Mr. Carver and Riverview are unreasonable and include non-compensable services and charges.

Because of the multiple genuine issues of material fact that remain, this court should reverse the trial court's summary dismissal of the claims against Mr. Carver and Riverview and remand for further evidentiary proceedings. This court should also reverse the awards of attorney fees and costs to Mr. Carver and Riverview because these awards are premature based on the outstanding factual issues and are for unreasonable amounts.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting summary judgment in favor of Philip Carver, in his capacity as Personal Representative of the Estate of Robert T. Ridley. CP at 474-75, 498.
2. The trial court erred in granting summary judgment in favor of Riverview Community Bank. CP at 498-99, 556-59.
3. The trial court erred in denying Ms. Prom's motion for reconsideration of its order granting summary judgment in favor of Riverview Community Bank. CP at 620-21.
4. The trial court erred in granting the motion for attorney fees by Philip Carver, Personal Representative of the Estate of Robert T. Ridely and in determining the reasonable amount of such fees. CP at 629-32.
5. In its March 4, 2015 findings of fact and conclusions of law regarding Mr. Carver's request for attorney fees and costs, the trial court erred in entering Findings of Fact Nos. 4-7, 11-12 and Conclusions of Law Nos. 2-5. CP at 629-32.
6. The trial court erred in granting the motion for attorney fees by Riverview Community Bank, in determining the reasonable amount of such fees, and in entering judgment in favor of Riverview for such fees. CP at 625-28, 635-36.
7. In its March 4, 2015 findings of fact and conclusions of law regarding Riverview's request for an award of attorney fees and costs, the trial court erred in entering Findings of Fact Nos. 8-12 and Conclusions of Law Nos. 1-4. CP at 625-28.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Because multiple genuine issues of material fact remain with respect to Ms. Prom's claims against both Mr. Carver and Riverview and because the trial court applied incorrect standards and substantive law, should this court reverse and remand for further evidentiary proceedings? YES.

2. Based on the multiple genuine factual disputes with respect to Riverview, did the trial court abuse its discretion in denying Ms. Prom's motion to reconsider summary dismissal of Riverview? YES.
3. The trial court misinterpreted RCW 11.96A.150 as a mandatory, prevailing party standard instead of an equitable standard and, then, awarded unreasonable amounts of attorney fees and costs to Mr. Carver and Riverview as a litigation afterthought and without conducting a *lodestar* or any detailed analysis. Because of these errors, should this court reverse the awards of attorney fees and costs in favor of Mr. Carver and Riverview? YES.

IV. STATEMENT OF THE CASE

A. *Kimly Prom and Jenna Suy had a longstanding, familial relationship with Robert Ridley and his late wife, Charlotte.*

In the early 1980s petitioner, Kimly Prom and her sister, Respondent, Jenna Suy, immigrated to the United States as refugees from Cambodia as a result of the genocide that took place in their country. CP at 450.

Shortly after immigrating, they met Robert Ridley and his wife, Charlotte. CP at 450. Ms. Prom and Ms. Suy soon developed a close, intimate relationship with Mr. and Mrs. Ridley. CP at 450. Ms. Prom and her sister grew to consider Mr. and Mrs. Ridley as adoptive parents, referring to them as "dad" and "mom." CP at 450.

From the 1980s through 2009, when Mrs. Ridley passed away, both Mr. Ridley and his wife attended all celebratory events that marked the lives of Ms. Prom and her sisters, including birthdays, graduations, weddings, and births of children. CP at 450. After Mrs. Ridley passed

away, Ms. Prom and Ms. Suy continued their close, familial relationship with Mr. Ridley and Mr. Ridley continued to attend all family events and gatherings. CP at 451.

Mr. Ridley intended to leave significant funds to Ms. Prom and Ms. Suy through a POD designation on his Riverview Community Bank checking account. *See* CP at 451-52. But, after his death, Ms. Prom learned that her sister, Ms. Suy, had unduly influenced Mr. Ridley to execute another POD beneficiary designation form, which left his entire checking account to Ms. Suy. *See* CP at 3-36.

Ms. Prom filed a Petition under chapter 11.96A RCW (TEDRA) in Clark County Superior Court, alleging, among other things, that: (1) the POD beneficiary designation that Ms. Suy procured through undue influence was void or voidable and that the first POD beneficiary designation naming both Ms. Prom and Ms. Suy should control disposition of the funds in Mr. Ridley's checking account, and (2) Riverview Community Bank had violated its own policies and procedures such that transfers it had made from Mr. Ridley's checking account before his death were void. CP at 3-36. Ms. Prom named Ms. Suy, Riverview Community Bank, and Philip Carver, the Personal Representative of Mr. Ridley's estate as defendants in her TEDRA Petition. CP at 3-36.

B. *Mr. Carver, Personal Representative of the Estate of Ridley, moved the court for summary judgment based only on the Deadman's Statute and, with no additional argument or briefing, Riverview joined in Mr. Carver's motion.*

Mr. Carver filed for summary judgment, arguing that he and the Estate should be dismissed from the case as a matter of law. CP at 86-90. In his motion, Mr. Carver argued *only* that Ms. Prom “has no admissible evidence to support her claims” because she is an interested party under the Deadmans Statute¹ and, as such, she “is barred from testifying that she heard a promise or agreement from Mr. Ridley to leave her money.” CP at 87, 89. Mr. Carver mused that “[a]pparently, only the first *three* claims [in the TEDRA Petition] might implicate the Estate of Ridley. All claims against the Estate require, first, that there was a POD account naming [Ms. Prom] at the time of [Mr.] Ridley’s death. *There wasn’t, and there never was.*” CP at 87 (emphasis added). Thus, Mr. Carver concluded that Ms. Prom “cannot prove with any admissible evidence that she had POD status on [Mr.] Ridley’s account at the time of his death (or at any time), nor can she prove that he ever promised to give her that status, or any amount of money.” CP at 90.

With no additional argument and no additional briefing and without acknowledging that Mr. Carver’s motion addressed only three causes of

¹ Codified at RCW 5.60.030.

action while it asked the court to dismiss *four* causes of action against it, Riverview joined in Mr. Carver's motion. *See* CP at 92-93. Riverview's joinder stated in its entirety that it:

[H]ereby joins in respondent Philip Carver's motion for summary judgment of dismissal.

Only the first *four* claims for relief in the petition even arguably seek to impose liability upon Riverview. For the reasons set forth in Carver's motion for summary judgment [i.e., the Deadman's Statute], arguments in which Riverview joins, Riverview is also entitled to an order dismissing all of petitioner's claims against it.

CP at 92 (emphasis added).

C. In response to Mr. Carver's motion for summary judgment and Riverview's joinder, Ms. Prom submitted substantial admissible evidence in support of her claims.

In May 2012, shortly before he passed, Ms. Prom learned from Mr. Ridley that he had been diagnosed with a terminal illness. CP at 451. In June 2012, Ms. Prom, Ms. Suy, Ms. Suy's husband, and a home care provider, Ramona, took shifts to provide Mr. Ridley with necessary care 24-hours a day, seven days a week. CP at 451. Ms. Suy would care for Mr. Ridley daily from approximately 8 a.m. to 5 p.m. and from 7 a.m. on Sunday until 5 a.m. on Monday. CP at 131, 445. In addition to the significant time that Ms. Suy spent caring for Mr. Ridley, her husband would also care for Mr. Ridley at night. CP at 131, 445.

Beyond physically caring for Mr. Ridley on a daily basis during his last illness, Ms. Suy also assisted him with his finances, helping him pay

bills and consolidate his multiple financial accounts by closing them and depositing the proceeds into Mr. Ridley's checking account at Riverview Community Bank. CP at 133-34,445. Indeed, Ms. Suy testified that Mr. Ridley would allow only her to assist him with his finances. CP at 139, 254.

On or about June 12, 2012, Mr. Ridley retained attorney, Sam Gunn, to assist him with his estate planning. CP at 182-84. According to Mr. Gunn, Mr. Ridley had over a dozen bank accounts where assets were held and discussions were had to consolidate the funds in those many accounts into a Trust Account. CP at 185. Nonetheless, Mr. Ridley had been a longtime checking account holder at Riverview Community Bank. Accordingly, Mr. Gunn contacted Val Berrissoul, an assistant branch manager at Riverview Community Bank's Main Branch in Vancouver to assist with opening the Trust Account. CP at 186-88. Although Mr. Ridley signed a release authorizing Riverview to release information to Mr. Gunn, Mr. Ridley never executed any document that would have authorized Mr. Gunn to transfer his financial assets. CP at 187-88.

During the time that Mr. Gunn was working with Ms. Berrissoul on the Trust Account, Mr. Ridley was also working to change his existing Riverview Community Bank checking account into a POD account. *See e.g.*, CP at 253-56, 445. Mr. Ridley was working on the POD account

directly with his longtime banker, Collette Tynan, branch manager of Riverview Community Bank's McArthur Branch, where he did most of his banking. *Id.* According to Ms. Tynan and Ms. Suy, Mr. Ridley intended on adding two POD beneficiaries to his checking account: Ms. Prom and Ms. Suy. CP at 134, 254-56, 445.

At her deposition, Ms. Tynan testified that on or about June 29, 2012, she informed Mr. Ridley that he had approximately \$560,000 in his checking account. CP at 256, 445. Mr. Ridley then instructed Ms. Tynan to prepare the necessary paperwork to change his checking account to a POD account designating both Ms. Prom and Ms. Suy as beneficiaries. CP at 254-59. Ms. Prom was present during the discussion with Mr. Ridley. CP at 451. Ms. Tynan then asked to see Ms. Prom's driver's license and social security card in order to prepare the necessary paperwork to add her as a beneficiary because Ms. Prom was not a customer of Riverview Community Bank. CP at 451. Ms. Prom handed Ms. Tynan her driver's license and social security card and Ms. Tynan testified that she wrote down the information needed from the identification cards. CP at 451-52.

Ms. Tynan testified that, in the afternoon of June 29, she left her meeting at Mr. Ridley's home and returned to the McArthur Branch, instructing her assistant branch manager, Mary Rowe, to prepare a POD

account agreement for Mr. Ridley's review and signature that established his checking account as a POD account with two beneficiaries: Ms. Prom and her sister. CP at 254-59, 262, 445. Ms. Rowe prepared a written account agreement designating both Ms. Prom and Ms. Suy as POD beneficiaries of Mr. Ridley's checking account. CP at 254-59, 262, 445. Since June 29, 2012 was a Friday and it was late in the afternoon, however, Ms. Tynan waited until Monday morning to present the POD account agreement to Mr. Ridley. CP at 254-55, 445.

On Monday, July 2, 2012, Ms. Tynan took the written account agreement designating both Ms. Prom and Ms. Suy as POD beneficiaries of Mr. Ridley's checking account to his house for his review and signature. CP at 134-35, 261-62, 445. Ms. Tynan recalls that Ms. Suy was also at Mr. Ridley's home on July 2. CP at 262. Ms. Tynan testified in her deposition that she recalled that, in the course of reviewing the written, POD account agreement that designated both Ms. Prom and Ms. Suy as beneficiaries with Mr. Ridley, Ms. Suy being present along with Mr. Ridley and, upon her arrival recalls a discussion about removing Ms. Prom's name from the account as a POD beneficiary because of "state income or didn't want to make things harder for her with reporting income or something about the Cambodian government." CP at 262, 445. Ms. Tynan further testified that she recalled Respondent, Jenna Suy, making a

comment about how she takes care of Mr. Ridley and that she will take care of her sister. CP at 262-63, 445.

Similarly, in her deposition, Ms. Suy testified that on July 2, 2012, Ms. Tynan presented Mr. Ridley with an account agreement with two beneficiaries listed, herself and her sister, Kimly Prom. CP at 134-35, 445. Ms. Suy testified that she saw this account agreement designating her and Ms. Prom as POD beneficiaries of Mr. Ridley's Riverview checking account when Ms. Tynan presented it to Mr. Ridley and that she witnessed Mr. Ridley sign it. CP at 135, 445 ("I saw Colette hold the paper and my dad sign the paper.") Ms. Tynan testified that she did not recall if Mr. Ridley signed this first POD account agreement that named both Ms. Suy and Ms. Prom as beneficiaries. CP at 263. Ms. Suy stated that this was the first time she had heard or was made aware of her sister being named as a beneficiary. CP at 134-35, 445. Ms. Suy testified that, in Mr. Ridley's presence, Ms. Tynan told her that Mr. Ridley's checking account had a balance of \$500,000 and that, after Mr. Ridley's death, those funds would be equally divided between her and Ms. Prom, with each sister receiving \$250,000. CP at 133-35, 445.

Ms. Suy then told Mr. Ridley "my sister, she's old and the money is not going to grow if you put it under her name." CP at 134, 445. Ms. Suy testified that Mr. Ridley then instructed Ms. Tynan to change the Account

Agreement to have only one beneficiary, Jenna Suy, which Ms. Tynan confirmed at her deposition. CP at 133-35, 262, 445. Ms. Suy further testified that, having seen both POD account agreements, to her knowledge, the only difference between them was that the first POD account agreement listed her and Ms. Prom as beneficiaries and the second POD account agreement listed her as the sole beneficiary. CP at 136-37, 445.

Immediately after Mr. Ridley advised Ms. Tynan that he wished to designate only Ms. Suy as POD beneficiary of his checking account, she returned to her branch, shredded the first POD account agreement that designated both Ms. Suy and Ms. Prom as POD beneficiaries, and had Ms. Rowe prepare a second POD account agreement that designated only Ms. Suy as beneficiary of Mr. Ridley's checking account. CP at 259, 262-64, 286, 445. Riverview destroyed the only copies of the first POD account agreement. *Id.*; *see also* CP at 341-43, 445.

Both the first POD account agreement and the second POD account agreement were executed by Mr. Ridley on July 2, 2012. CP at 135, 262-65, 445. Also on July 2, Ms. Berrissoul created and funded Mr. Ridley's Trust account. CP at 188, 399-400, 445-46. It appears, however, that Mr. Ridley signed the Trust account agreement sometime on or before June 29 and that Ms. Berrissoul filled in the July 2 date herself, which she testified

was her general practice. CP at 187-88, 399-400, 445-46. Riverview's own policies and procedures, however, required the customer to date the account agreement the date it was actually signed. CP at 342-43.

Curiously, even though Ms. Tynan met with Mr. Ridley in person on two occasions on July 2, Mr. Ridley did not advise her that he was working on a Trust account and, although they reviewed his checking account balance, Mr. Ridley did not advise Ms. Tynan of any impending transfers out of his checking account. CP at 264.

Also at this time, after Ms. Berrissoul prepared the Trust account paperwork but before she funded it, large deposits were being made into Mr. Ridley's Riverview checking account and Ms. Berrissoul *assumed* that those funds were intended for the Trust account rather than the checking account "because he was in hospice." CP at 396-97. Mr. Ridley never directly instructed Ms. Berrissoul to create the Trust account. CP at 397-99.

The Trust account documentation prepared by Ms. Berrissoul states in typed numbers that the initial deposit amount was \$215,000; however, that amount is crossed out and was replaced with the handwritten figure of \$590,000. CP at 188-89, 191, 232-33, 445. When Mr. Ridley signed the Trust account agreement, Mr. Gunn testified that the accounts initial balance was identified as \$215,000. CP at 190-91, 445. Under

Riverview's policies and procedures, it was not appropriate for Ms. Berrissoul to cross out the typed initial deposit amount of \$215,000 and replace it with the handwritten figure of \$590,000. CP at 344-45, 445. Additionally, Riverview requires account agreements to be reviewed and initialed by an employee other than the person who prepared the agreement before being created. CP at 344-45, 402, 445-46. Ms. Berrissoul prepared the Trust account agreement, modified the initial deposit amount, and created the account without having her manager review and initial the documentation. CP at 344-45, 402-03, 445-46.

Mr. Gunn further testified that he recalls that Ms. Berrissoul did not have authorization from Mr. Ridley to transfer \$569,000 from his checking account to his Trust account on July 2. CP at 192, 445. Similarly, Mr. Gunn was not aware of Riverview showing Mr. Ridley the Trust account documentation showing that the typed initial deposit amount of \$215,000 was crossed out and replaced with \$590,000. CP at 192-93, 232-33, 445. Although Mr. Gunn did not have authority to transfer Mr. Ridley's funds, Ms. Berrissoul e-mailed Mr. Gunn after making that transfer to confirm authorization to transfer \$569,000 (curiously not the \$590,000, which was the handwritten figure on the account agreement) from Mr. Ridley's checking account to his Trust account. CP at 192-93, 231-33, 445.

Nonetheless Ms. Berrissoul testified that she spoke to Mr. Ridley on July 2, stating that she called and asked to speak with Mr. Ridley and, even though she had never spoken to him before, she “kn[e]w him by voice” because he sounded “very ill” and she assumed that it was him without taking any action to verify his identity. CP at 400-01. While Ms. Berrissoul has stated that she had Mr. Ridley’s verbal authorization to transfer \$590,000 from his checking account to his Trust account, she actually transferred \$569,000—not \$590,000—and she could not explain this discrepancy. CP at 400-04. Riverview’s policies and procedures required its employees to objectively verify a customer’s identity when obtaining verbal authorization for a transaction. CP at 408-09. Additionally, through the course of this litigation, Riverview learned that Ms. Berrissoul did not actually call Mr. Ridley for authorization to transfer funds from his checking account to his Trust account. CP at 224, 345-46, 445. Transferring funds without a customer’s authorization is a violation of Riverview’s policies and procedures, which can lead to corrective action. CP at 346-47.

After Riverview transferred the \$590,000 from Mr. Ridley’s checking account into his Trust account, checks that were outstanding continued to clear, which caused Mr. Ridley’s checking account to be overdrawn. CP at 193. Mr. Ridley’s longtime banker, Ms. Tynan, was shocked to learn of

the overdraft. CP at 266, 276. In her 28-years of banking experience, Ms. Tynan had never encountered a similar situation and determined that it was a “big deal.” CP at 266-67. Ms. Tynan understood that it was Mr. Gunn who had authorized this transfer. CP at 268-70. Ms. Berrissoul, however, testified that it was not uncommon for one account to become overdrawn when a customer is in the process of establishing a second account and transferring funds between those accounts; in instances such as this, Ms. Berrissoul testified that Riverview would waive overdraft fees. CP at 404-06.

In order to cover those outstanding checks, Riverview transferred \$200,000 back from Mr. Ridley’s Trust account into his checking account; after this transfer, the balance of Mr. Ridley’s checking account was approximately \$150,000. CP at 193-94. Mr. Gunn testified that he did not authorize this \$200,000 transfer. CP at 194. Nor was Mr. Gunn ever informed that Riverview had obtained verbal authorization from Mr. Ridley for this transfer. CP at 202. Nonetheless, Ms. Tynan understood from Ms. Berrissoul that it was Mr. Gunn who had authorized this transfer. CP at 275. Conversely, Ms. Berrissoul testified that she called Mr. Ridley, recognizing his voice from their July 2 conversation and, thus, failing to objectively verify his identity as required by Riverview’s policies and procedures, and obtained his authorization to transfer

\$200,000 back from the Trust account to the checking account. CP at 408-09.

Days later, Mr. Ridley died. CP at 4. The balance of Mr. Ridley's checking account at the time of his death was \$139,865.89, which Riverview paid to Ms. Suy as the account's POD beneficiary. CP at 316-17.

D. In reply, Mr. Carver and Riverview raised new arguments.

In replying to Ms. Prom's response to Mr. Carver's motion and Riverview's joinder, Mr. Carver abandoned his argument made in his motion for summary judgment, which were based only on the Deadman's Statute, and argued instead that Ms. Prom could not show undue influence by Ms. Suy and that Ms. Prom's claims for replevin or constructive trust should fail against the Estate because either Ms. Suy or Mr. Ridely's trust held the funds at issue. CP at 467-72.

Similarly, on reply, even though Riverview argued that the "same facts and analysis set forth in Carver's motion and reply compel the dismissal of Petitioner's claims against Riverview[,]” it went on to raise new arguments. *See* CP at 462-65. Namely, Riverview argued for the first time on reply that it was immune from liability under former chapter 30.22 RCW and that Ms. Prom lacked standing to assert her claims against Riverview because she failed to present evidence sufficient to show that

the second POD beneficiary designation was procured through undue influence such that the first POD beneficiary designation should control. *See* CP at 462-65. In doing so, however, Riverview also acknowledged that it “destroyed the first POD account agreement because it named both [Ms. Prom] and Suy[,]” which Riverview argued was “contrary to Mr. Ridley’s revised intention” CP at 463.

E. *In addition to permitting Mr. Carver and Riverview to raise new issues in their reply materials, the trial court also permitted them to raise new arguments at the hearing on summary judgment and, ultimately, granted their motions for summary judgment without analyzing the genuine factual disputes raised by Ms. Prom.*

At the beginning of the summary judgment hearing, the court stated that it had “reviewed the pleadings filed by the attorneys on behalf of the parties[and that t]his would be the opportunity to supplement by way of oral argument.” RP at 4. Counsel for Mr. Carver presented argument first. *See* RP at 4. He argued that Ms. Prom “ha[d]n’t really stated a claim, or [she] d[i]dn’t really have a theory that would implicate Mr. Carver as personal representative of the estate.” RP at 5. He continued by acknowledging that he “initially thought this would be a deadman’s statute case, *but apparently there is some evidence that some people would say they did hear that. And he [Mr. Ridley] went so far, apparently, as to prepare a – or have the bank prepare an account agreement with both Kimly Prom and Jenna Suy on it as POD beneficiaries. . . . there is*

testimony that it did occur.” RP at 5-6 (emphasis added). He went on to argue, however, that before Riverview formally entered Ms. Prom and Ms. Suy as POD beneficiaries of Mr. Ridley’s checking account, Mr. Ridley changed his mind regarding the account’s disposition. RP at 4-5. He further argued that “. . . the only way [Ms. Prom] could have gotten money at the end of the day after Mr. Ridley died was *if she would have been on the account as a POD beneficiary, and she wasn’t. . . . So I don’t think that she has stated, really, in her pleading, a claim against the estate or Mr. Carver . . .*” RP at 8-9 (emphasis added). But Riverview had conceded that Mr. Ridley had executed a written POD beneficiary designation for his checking account that left the funds in the account to both Ms. Prom and Ms. Suy. CP at 463.

In addressing Mr. Carver’s motion for summary judgment, the court stated only:

The Court: Well, thank you, Counsel, for the argument, as well as for the written pleadings.
The – first of all, as to the original moving party of the estate and Mr. Carver, I find that no claim has been articulated or substantiated here against the estate or Mr. Carver, and therefore grant the motion for summary judgment in favor of the defendant, the estate and Mr. Carver.

RP at 23.

In presenting oral argument in support of summary dismissal in favor of Riverview, Riverview's counsel reiterated its new arguments regarding former chapter 30.22 RCW and standing. *See* RP at 9-11. Additionally, contrary to its briefing, Riverview's counsel argued that Ms. Prom was "*never named as a beneficiary, co-depositor, or in any way on the Riverview accounts.* She has no standing to object to how Riverview handled those accounts. Again, Mr. Ridley would be the person that would be the proper person to object to that." RP at 10 (emphasis added); *but see* CP at 463. The trial court took Riverview's request for summary dismissal under advisement. RP at 23-25.

Then, in a letter ruling, the trial court stated that it was granting summary judgment in favor of both Mr. Carver and Riverview. CP at 498-99. Regarding Mr. Carver's motion, the trial court stated that Ms. Prom "does not allege that Mr. Carver or Mr. Ridley wrongfully caused any of her damages, or that any money she claims ended up in the Estate. She therefore fails to establish a claim against Carver." CP at 498. Regarding Riverview, the trial court stated that Ms. Prom "argue[d] the bank had a duty to investigate whether there had been undue influence in the designation of the POD beneficiary" CP at 499. Attempting to distinguish *Estate of Brownfield*, the trial court noted that, in *Brownfield*,

[t]he case involved a conflict in the bank's own records which created an issue of fact in applying RCW Chapter 30.22." CP at 499.

Without addressing the impact of Riverview having destroyed the POD designation form that named both Ms. Prom and Ms. Suy as beneficiaries of Mr. Ridley's checking account and without even acknowledging that Ms. Prom presented evidence showing that Riverview branch manager Collette Tynan witnessed Ms. Suy's exercise of undue influence over Mr. Ridley, the trial court concluded:

There is no provision in RCW Chapter 30.22 or in [*Brownfield*] which requires a bank, with a clear written designation of POD beneficiary, to investigate potential claims of undue influence. Riverview was entitled to rely upon the terms of the written contract of deposit. Having failed to establish a claim against Riverview as to the funds in the account, [Ms. Prom] has no standing to assert any violation of policies and procedures with respect to transfer of funds from the account.

CP at 499. The trial court then entered an order incorporating its written ruling and granting summary judgment in favor of Riverview. CP at 556-59.

Noting that the trial court had shifted the burdens on summary judgment, misapplied the law, and overlooked several genuine factual disputes—including that a Riverview branch manager had actual knowledge of Ms. Suy's undue influence and that Riverview had failed to rebut the presumption of undue influence based on Ms. Suy and Mr.

Ridley's confidential relationship, Ms. Prom asked the court to reconsider its order summarily dismissing Riverview. CP at 560-75. In response, Riverview mused only that it would "not repeat its prior arguments." CP at 591-93.

The trial court declined oral argument on Ms. Prom's motion for reconsideration and, instead, summarily ruled on the motion, stating: "It was issues that we had discussed earlier, and therefore I deny the motion for reconsideration." RP at 30.

F. *The trial court entered orders awarding Mr. Carver and Riverview substantial amounts of attorney fees and costs, without conducting any analysis on the record and apparently without conducting any lodestar analysis.*

Mr. Carver and Riverview both requested awards of their reasonable attorney fees and costs under RCW 11.96A.150. *See* CP at 494-97, 588-90. Mr. Carver requested attorney fees in the amount of \$32,438.50 plus costs in the amount of \$2,419.26. CP at 477. Riverview requested an award of attorney fees in the amount of \$16,680 plus costs in the amount of \$1,441. CP at 579.

In opposing these requests, Ms. Prom presented several, specific challenges to whether specific legal services performed or costs incurred were compensable and argued that Mr. Carver and Riverview had not met

their burden of establishing that the amount of fees requested was reasonable. *See* CP at 596-600, 605-10.

For example, Ms. Prom noted that, of the \$34,857.76 that Mr. Carver requested in attorney fees and costs, at least \$10,172.52 was not compensable because it included fees attributable to duplicative services, attorneys performing clerical tasks, non-attorney staff performing clerical tasks, and substantial costs for photocopies, postage, computer legal research, and mileage. CP at 605. Similarly, Ms. Prom noted that Riverview's request for a total award of \$18,121 included at least \$5,023.50 that was not compensable because it included fees attributable to duplicative services, attorneys performing clerical work, attorneys communicating with and reporting to Riverview's insurer (that was ostensibly covering the costs of Riverview's defense), and transcription costs. CP at 596-600. Neither Mr. Carver nor Riverview filed reply materials to address the concerns raised by Ms. Prom. *See* CP.

Then, at hearing, in addressing Mr. Carver's and Riverview's requests for awards of substantial attorney fees, the trial court conducted the following exchange:

The Court:	And the remaining issue may be as to attorney's fees. And both defendants have requested those?
Mr. Kitchel:	We have.

The Court: Anything you wish to add?

Mr. Potter: I'll go first, Your Honor.

The Court: All right.

Mr. Potter: Mr. Leatham set forth this statutory authority for the fees. It seems pretty clear. *I think in response, there is some disputing of maybe the reasonableness, or at least the way they're set out, or something.* But I'll just let the documents speak for themselves, Your Honor.

The Court: *Had you prepared a proposed order with findings and conclusions? Having recently had a matter remanded from the Court of Appeals because we had failed to enter specific findings, they seem to want quite a bit of detail as to these issues.*

Mr. Potter: Mr. Leatham had not done that, Your Honor.

The Court: All right. Well, *I think I can take into account the objections that are made if you can submit a proposed order, particularly one I can revise, so –*

Mr. Potter: All I have is a judgment, so I'll –

The Court: --in a format that's findings and conclusions in detail with respect to that, that then I could use to revise to take into account any objections on a more detailed basis. They actually want quite a bit of detail, I believe, these days.

Mr. Potter: All right. Very well. And it breaks it –

Mr. Kitchel: Yes.

The Court: I think that probably – anything that you wish to address specifically at this point?

Mr. Kitchel: No, Your Honor. Would you like that in a Word

format on disk? Or –

The Court: I think – if you could check with Danielle on your way out, and she'll tell you what form is needed. I think Word generally is okay, but there is even some Word this and –

Mr. Kitchel: Sure.

The Court: -- various forms of that. *And if you present anything further proposed, then, to Counsel, then I can consider it further.*

Was there anything you wanted to add in terms of your objections? There was quite a bit laid out in your written document there, so. . .

Ms. McLeod: Thank you. Yes. And the written filings are comprehensive.

The Court: All right.

Ms. McLeod: And we just ask that Your Honor not confuse RCW 11.96A.150 as a prevailing party standard. The Court still has very broad discretion to deny fees as equity requires. And in this instance, Ms. Prom's claims were brought in good faith, they presented debatable issues, *and equity would weigh in favor of denying[]*

The Court: All right. *And I know that Plaintiff would have asked for fees, too, probably, if alleged also. So it does amount to substantial amounts. And I think that's why the Court of Appeals wants us to be sure to enter detailed findings.*

Mr. Potter: Does Your Honor have a docket in two weeks?

. . . .

Ms. McLeod: That should be fine. And Your Honor, I just, again, re-ask that in reviewing the proposed findings and conclusions, and amounts that they've proposed,

please conduct a robust Lodestar analysis determining the reasonableness as well as all compensable amounts.

The Court: Let's see. Today's the 9th [of January]. I do have a docket in two weeks, or we could leave it on a somewhat open basis. *Why don't we ask the clerk to set it over two weeks, but I may not need argument on that. . . .* If Counsel has submitted everything in written form, I can do it on the written pleadings, then.

RP at 35-39. But, even though counsel had not submitted everything in written form within two weeks, the court did not hold hearing to conduct its *lodestar* analysis. *See e.g.*, CP, RP. Instead, almost two months after hearing, the court entered written findings of fact and conclusions of law that the \$16,680 in fees and the \$1,441 in costs requested by Riverview were reasonable and taxable. CP at 625-27. The court made no interlineations or handwritten revisions to the proposed order submitted by Riverview and entered judgment in favor of Riverview based on its findings and conclusions. *See* CP at 625-27.

With respect to Mr. Carver's request for an award of attorney fees and costs, the court entered findings and conclusions stating that "[t]he hourly rate charged [of \$375] is reasonable for the community, and reasonable for the reputations, experience, and abilities of the attorneys performing the services. However, the court will reduce the amount to \$300 per hour on a discretionary basis." CP at 630. The court also entered a finding

that “[t]he work done was not unnecessary, duplicative, or clerical in nature. There were no apparent wasted efforts, unidentifiable costs, or vaguely worded time entries.” CP at 631. Thus, the trial court awarded Mr. Carver \$25,950 of the \$32,438.50 in fees that he requested and awarded him all of his requested \$2,419.26 in costs. CP at 632.

G. Posture on appeal

Upon the stipulation of Ms. Prom and Ms. Suy, the remaining defendant in this matter, the trial court entered an order staying further proceedings at the trial court level pending Ms. Prom’s interlocutory appeal of the issues with respect to Mr. Carver and Riverview. CP at 622-24. After initially filing a notice for discretionary review of the trial court’s rulings on Mr. Carver’s and Riverview’s motions, on Ms. Prom’s motion, the trial court entered a designation under CR 54(b) and RAP 2.2(d), finding that there is no just reason to delay appellate review of the trial court’s orders on Mr. Carver’s and Riverview’s motions, concluding that such orders constitute final judgments with respect to Mr. Carver in his capacity as Personal Representative and Riverview, and directing that they are subject to immediate appeal as a matter of right. CP at 637-38, 659-76, 691-95. Ms. Prom, therefore, appealed as a matter of right. CP at 696-98. All claims against Ms. Suy remain stayed at the trial court level pending resolution of this appeal. CP at 693.

V. ARGUMENT

A. *The trial court erred by granting summary judgment in favor of Riverview and Mr. Carver because it: (1) misapplied the summary judgment standard by allowing Mr. Carver and Riverview to raise new issues on reply and in oral argument, (2) ignored genuine disputes of material fact and overlooked the parties' concessions, and (3) misinterpreted the law.*

Appellate courts review orders granting summary judgment de novo, performing the same inquiry as the trial court. *Aba Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). Dismissal of claims on summary judgment is proper only when there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. CR 56; *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 852, 991 P.2d 1182 (2000). On summary judgment, however, the court does not weigh the evidence presented or make witness credibility determinations. *American Exp. Centurion Bank v. Stratman*, 172 Wn. App. 667, 676, 292 P.3d 128 (2012).

The purpose of summary judgment is to avoid a trial that would be useless; however, a trial is not useless and is “absolutely necessary where there is a genuine issue as to *any* material fact.” *Preston v. Duncan*, 55 Wn.2d 678, 681, 349 P.2d 605 (1960). For purposes of summary judgment, a material fact is a fact that affects the outcome of the litigation. *Kinney v. Cook*, 150 Wn. App. 187, 192, 208 P.3d 1 (2009).

The party moving for summary judgment bears burden of showing that it is entitled to judgment as a matter of law while the facts and all reasonable inferences from the facts are considered in the light most favorable to the nonmoving party. *Francom*, 98 Wn. App. at 852. Even if the facts are not in dispute, summary judgment is not appropriate if different inferences may be drawn from those facts. *Preston*, 55 Wn.2d at 681-82. Only when the moving party meets its initial burden on summary judgment does the burden to come forward to show genuine factual disputes shift to the nonmoving party. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 222, 770 P.2d 182 (1989).

Further, a party moving for summary judgment must raise all issues in its opening motion and brief. *See R.D. Merrill Co. v. State*, 137 Wn.2d 118, 147, 969 P.2d 458 (1999). Summary judgment is not proper when the moving party raises a new issue in reply because doing so would deprive the non-moving party of the opportunity to respond. *See id.* Even assuming that a harmless error analysis applied when the trial court permitted new issues to be raised on reply, such an error cannot be harmless because “[i]t is unfair to grant the extraordinary relief of summary judgment without allowing the nonmoving party the benefit of a clear opportunity to know on what grounds summary judgment is sought.” *Id.* at 148.

Here, the trial court erred by granting the extraordinary relief of summary dismissal to both Mr. Carver and Riverview after permitting them to raise new issues in reply and in oral argument. Indeed, on summary judgment, the issues and arguments raised by Mr. Carver and Riverview constantly evolved, thus depriving Ms. Prom of the right to know the basis of both Mr. Carver's and Riverview's motions. For example, Mr. Carver's motion was based solely on his claim that Ms. Prom had no admissible evidence to support her claims based on the Deadman's Statute. *See* CP at 87-90. Mr. Carver initially argued that the evidence showed that Mr. Ridley *never* executed a POD beneficiary designation that named both Ms. Prom and Ms. Suy as beneficiaries of the funds in his Riverview checking account. CP at 87. Without supporting any additional briefing or evidence, Riverview joined in Mr. Carver's motion for summary judgment. CP at 92.

The trial court erroneously permitted both Mr. Carver and Riverview to raise new issues and arguments in reply and in oral argument, which alone warrants reversal of the summary judgment orders in their favor. At the beginning of the hearing on Mr. Carver's motion for summary judgment and Riverview's joinder, the trial court invited the parties to *supplement* their filings by way of oral argument. *See* RP at 4. Thus, even though Mr. Carver's opening brief in support of his motion for

summary judgment focused solely on issues related to the Deadman's Statute, Mr. Carver abandoned his Deadman's Statute argument at oral argument and the trial court *still* granted summary judgment in his favor.² See RP at 5.

Additionally, for the first time on reply and again in oral argument, Mr. Carver raised the issue of whether the estate even held funds that Ms. Prom sought in this action. See CP at 467-72. Whether or not the estate held such funds *and* whether Mr. Carver as the estate's Personal Representative had authority to recover such funds are material issues of fact that Ms. Prom was unable to address because Mr. Carver raised them for the first time on reply. See CP at 467-72.

Similarly, attempting to obscure the fact that it merely joined in Mr. Carver's motion for summary judgment and, in doing so, failed to present argument in support of parts of its summary judgment motion, counsel for Riverview stated in oral argument:

² At oral argument, Mr. Carver's counsel stated:

I initially thought we would have a dead[]man's statute case, but *apparently there is some evidence* that some people would say they did hear that. *And he went so far, apparently, as to prepare . . . or have the bank prepare an account agreement for him with both Kimly Prom and Jenna Suy on it as POD beneficiaries.* We – again, that is not in evidence, *but there is testimony that it did occur.*

RP at 5 (emphasis added).

It is not clear from the complaint which counts or causes of action apply to which defendants.^[3] So the fact that we said four and the estate said three, or vice versa, I don't think is very relevant here. Obviously, we're objecting to any of the claims that apply to the bank. It's pretty clear by the pleadings that we're not conceding any, so I don't think this is a notice issue.

RP at 21. Also, Riverview argued for the **first time on reply** that it was immune from liability under former chapter 30.22 RCW and that Ms. Prom lacked standing to assert claims against it. CP at 462-65. The trial court ultimately based its decision to grant summary judgment in favor of Riverview on its arguments on former chapter 30.22 RCW and standing. CP at 498-99, 556-59. In permitting Riverview to raise these issues on reply *and in basing its summary judgment order on these issues*, the trial court erroneously deprived Ms. Prom of the opportunity to respond. Because the trial court incorrectly permitted both Mr. Carver and Riverview to re-frame their requests for summary judgment and raise new issues in reply and at oral argument, the trial court's summary judgment orders in their favor are in error and should be reversed.

In addition to the undue prejudice that Ms. Prom suffered based on the trial court permitting Mr. Carver and Riverview to raise new issues on reply and in oral argument, the trial court also ignored their own concessions and multiple genuine issues of material fact. For example,

³ Washington is a notice pleading state and neither Riverview nor Mr. Carver requested a more detailed statement of Ms. Prom's claims nor alleged that they had insufficient notice of the factual and legal basis of Ms. Prom's claims.

even though Mr. Carver's motion focused solely on whether Ms. Prom could overcome the Deadman's Statute, in oral argument, Mr. Carver's counsel acknowledged that "apparently there is some evidence that some people would say" that they did hear that Mr. Ridley intended to designate both Ms. Prom and Ms. Suy as POD beneficiaries of his checking account and that Mr. Ridely "went so far, apparently, as to . . . have the bank prepare an account agreement with both Kimly Prom and Jenna Suy on it as POD beneficiaries . . . there is testimony that it did occur." RP at 5-6. Mr. Carver's counsel further stated that Ms. Prom "could have gotten money at the end of the day after Mr. Ridley died . . . if she would have been on the account as a POD beneficiary" RP at 8. Moreover, Riverview acknowledged on reply that it had "destroyed the first POD account agreement because it named both [Ms. Prom] and Ms. Suy as POD beneficiaries" CP at 463.

Thus, Mr. Carver acknowledged that Ms. Prom could have viable claims against the estate if Ms. Prom was a named POD beneficiary of Mr. Ridley's Riverview checking account and Riverview acknowledged that Ms. Prom would have standing to assert claims against it if she was a named POD beneficiary of Mr. Ridley's checking account. Both Mr. Carver and Riverview conceded that Mr. Ridley had executed a POD designation that named *both* Ms. Prom and Ms. Suy as beneficiaries of his

Riverview checking account. *See* CP at 463; RP at 5. Based on the record before the court, Mr. Carver and Riverview conceded that Mr. Ridley had executed a written, signed an account agreement designating both Ms. Prom and Ms. Suy as POD beneficiaries of his Riverview checking account or, in the alternative, Ms. Prom raised—at a minimum—a genuine issue of material fact as to whether Mr. Ridley had designated both Ms. Prom and Ms. Suy as POD beneficiaries of the account. *See* CP at 131-344, 254-59, 262, 451, 445.

Further, both Mr. Carver and Riverview failed to rebut the presumption created by the evidence Ms. Prom presented that Ms. Suy procured the second POD beneficiary designation by undue influence such that it should be voided. Washington courts will rescind a contract if it was entered based on undue influence. *In re Estate of Jones*, 170 Wn. App. 594, 606, 287 P.3d 610 (2012). Undue influence involves unfair persuasion that seriously impairs free exercise of judgment. *Kitsap Bank v. Denley*, 177 Wn. App. 559, 570, 312 P.3d 711 (2013). Undue influence is a mixed question of fact and law. *Kitsap Bank*, 177 Wn. App. at 568. In responding to a motion for summary judgment, a party who bears the ultimate burden of proving undue influence must show that, when the facts and all reasonable inferences are taken in his or her favor, it is highly probable that undue influence could be established at trial. *Kitsap Bank*,

177 Wn. App. at 569. Summary judgment is not appropriate when, taking the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party, there are “certain suspicious facts and circumstances” giving rise to a presumption of undue influence. *See In re Estate of Lint*, 135 Wn.2d 518, 535, 957 P.2d 755 (1998). Where a confidential relationship exists, that may give rise to a rebuttable presumption of undue influence. *Estate of Jones*, 170 Wn. App. at 606. As a presumption of undue influence can support summary judgment in favor of a party who benefits from it (here, the Petitioner), it may also defeat the opponent’s motion for summary judgment. *See London v. City of Seattle*, 93 Wn.2d 657, 662, 611 P.2d 781 (1980).

A party challenging a POD beneficiary designation can defeat an opposing party’s motion for summary judgment by presenting evidence of undue influence based on the factors governing will contests:

(1) that the beneficiary occupied a fiduciary or confidential relation to the testator; (2) that the beneficiary actively participated in the procurement of the will; and (3) that the beneficiary received an unusually or unnaturally large part of the estate. Added to these may be other considerations, such as the age or condition of health and mental vigor of the testator, the nature or degree of relationship between the testator and the beneficiary, the opportunity to exert undue influence, and the naturalness or unnaturalness of the will.

Estate of Randmel v. Pounds, 38 Wn. App. 401, 405-06, 685 P.2d 638 (1984); see also *Estate of Haviland*, 162 Wn. App. 548, 558-59, ¶¶24-25, 255 P.3d 854 (2011). “A confidential relationship exists between two persons when one has gained the confidence of the other and purports to act or advise with the other’s interest in mind.” *Kitsap Bank*, 177 Wn. App. at 572 (internal citations omitted). Family and other close relationships can often become confidential relationships. *Kitsap Bank*, 177 Wn. App. at 572. “[C]ourts have found confidential relationships between family members when the testator lived with the beneficiary, was dependent on the beneficiary, or was emotionally or physically vulnerable.” *Kitsap Bank*, 177 Wn. App. at 572. For example, Washington courts have found a confidential relationship exists between a mother and sons when the mother was distraught by the recent death of her husband and was dependent on her sons because they operated the family business. *Estate of Jones*, 170 Wn. App. at 607-08.

Here, Mr. Carver and Riverview failed to respond to or rebut evidence that Ms. Prom presented showing that Ms. Suy and Mr. Ridley had a familial, parent-child like relationship and that Mr. Ridley relied on Ms. Suy and her husband to provide him with the majority of his significant, around-the-clock care during his final illness. CP at 131-39, 451. Ms. Prom also presented evidence that, at Mr. Ridley’s bedside, Ms.

Suy exercised her influence over Mr. Ridley to have him change his POD beneficiary designation to leave all funds in his Riverview checking account to her instead of leaving such funds to her and Ms. Prom. CP at 133-37, 254-59, 262-63, 445. Based on Ms. Suy and Mr. Ridley's confidential, parent-child-like and caretaker relationship, Ms. Suy's influence over Mr. Ridley's POD beneficiary designations, and Mr. Ridley's vulnerability, Ms. Prom raised a presumption that the second POD beneficiary designation was procured by undue influence, which both Mr. Carver and Riverview failed to address and failed to rebut with admissible evidence and failed to address in any meaningful way. *See* CP 462-72.

Thus, the trial court erred in granting summary judgment favor of Mr. Carver and Riverview based on the un rebutted presumption that the second POD beneficiary designation was procured by Ms. Suy's undue influence and, therefore, voidable such that the disposition of funds in Mr. Ridley's checking account should have been controlled by the first POD beneficiary designation.

Accordingly, the court should have concluded that Ms. Prom had status as a POD beneficiary of Mr. Ridley's checking account such that she had standing to challenge Riverview's improper formation and funding of the trust account. *See e.g.*, CP at 186-93, 224, 232-33, 342-46,

396-409. Indeed, in analyzing the record before the court, it appears that the trial court erroneously shifted the burden on summary judgment to Ms. Prom by failing to consider the evidence and reasonable inferences therefrom in the light most favorable to Ms. Prom. Instead, it appears that the trial court both considered the evidence presented in the light *least* favorable to Ms. Prom *and*, based on the substantial evidence presented by Ms. Prom and the dearth of evidence presented by Mr. Carver and Riverview, it also appears that the trial court improperly made credibility determinations and weighed evidence on summary judgment. This misapplication of the summary judgment standards and the multiple genuine issues of material fact preclude summary judgment in favor of Mr. Carver and Riverview.

Lastly, following Riverview's lead, the trial court failed to acknowledge that one of its branch managers, Collette Tynan, had *actually witnessed* Ms. Suy influenced Mr. Ridley at Mr. Ridley's bedside to execute a second POD beneficiary designation naming only her and that Riverview staff had then destroyed the first POD beneficiary designation form that named both Ms. Prom and Ms. Suy. CP at 131-35, 261-63. Thus, as a matter of law, the trial court erred in granting summary judgment in favor of Riverview based on former chapter 30.22 RCW.

Former RCW 30.22.120 stated: “*Unless a financial institution has actual knowledge of the existence of a dispute between depositors, beneficiaries, or other persons claiming an interest in funds deposited in an account, all payments made by the financial institution from an account at the request of any depositor . . . shall constitute a complete release and discharge of the financial institution . . .*” (Emphasis added). Moreover, “in the event of a discrepancy between the most recent contract in the bank’s files and other records of the bank . . ., the contract found in the file *does not definitively dictate the bank’s duties of disbursement.*” *Estate of Brownfield ex rel. Schneiter v. Bank of America, N.A.*, 170 Wn. App. 553, 562-63, 285 P.3d 886 (2012). Instead, a bank will not be released from liability if it distributes funds with actual knowledge of a dispute or adverse claim. *Id.* Thus, where a bank does have *actual knowledge* of a dispute or an adverse claim, a bank cannot blindly rely on the most recent written agreement that it happens to have in its file with impunity. *See id.*

Here, because the evidence presented showed that Riverview had actual knowledge of Ms. Suy having procured the second POD beneficiary designation through undue influence because Ms. Tynan actually witnessed Ms. Suy inducing Mr. Ridley to change his POD beneficiary designation at his sickbed, Riverview is not immune from liability under former chapter 30.22 RCW and *Brownfield*. *But see* CP at 498-99.

Alternatively, the evidence that Ms. Prom presented raised a genuine issue of material fact as to whether Ms. Tynan and Riverview had actual knowledge that Ms. Suy procured the second POD beneficiary designation through undue influence or actual knowledge of Ms. Prom's adverse claim or actual knowledge of the dispute regarding ownership of funds in Mr. Ridley's checking account. Thus, the trial court erred in granting summary judgment in favor of Riverview based on former chapter 30.22 RCW and *Brownfield*.

Consequently, this court should reverse the trial court's orders summarily dismissing Ms. Prom's claims against Mr. Carver in his capacity as Personal Representative of the estate and Riverview and should remand for trial.

B. *The trial court abused its discretion by summarily denying Ms. Prom's motion for reconsideration of the order granting summary judgment in favor of Riverview.*

Appellate courts review orders denying motions for reconsideration for a manifest abuse of discretion. *Sligar v. Odell*, 156 Wn. App. 720, 734, 233 P.3d 914 (2010). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Sligar*, 156 Wn. App. at 734. Motions for reconsideration may be granted when:

On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly

separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;

....

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or

(9) That substantial justice has not been done.

CR 59(a).

Here, as analyzed above, the trial court erred in granting summary judgment in favor of Riverview because it permitted Riverview to raise new issues on reply and in oral argument, misapplied the summary judgment standard, overlooked multiple genuine disputes of material fact, and misinterpreted former chapter 30.22 RCW and *Brownfield*. *See supra*. The gravity of these errors are so significant that, even under the abuse of discretion standard of review applicable to denials of reconsideration, this court should reverse the summary dismissal of Ms. Prom's claims against Riverview and remand for trial.

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C. *The trial court erred in summarily granting Riverview's and Mr. Carver's motions for attorney fees and abused its discretion in determining the reasonable amount of such fees.*

Under Washington law, a trial court may only grant an award of attorney fees if the request is based on a statute, contract, or recognized ground in equity. *Gander v. Yeager*, 167 Wn. App. 638, 645, 282 P.3d 1100 (2012). Although RCW 11.96A.150 may provide a statutory basis for an award of attorney fees in certain circumstances, such awards remain discretionary. *See* RCW 11.96A.150. Instead, Washington courts retain broad discretion to deny attorney fee requests for any reason that the court deems reasonable and appropriate. RCW 11.96A.150; *In re Washington Builders Ben. Trust*, 173 Wn. App. 34, 85, 293 P.3d 1206 (2013); *Estate of Stover*, 178 Wn. App. 579, 587, 315 P.3d 579 (2013).

Washington courts cannot merely accept a fee declaration without considering its reasonableness; instead, “[c]ourts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought.” *Berryman v. Metcalf*, 135 Wn. App. 644, 657, 312 P.3d 745 (2013)(quoting *Mahler v. Szucs*, 135 Wn.2d 398, 434-35, 957 P.2d 305 (1998))(emphasis in original). Before a court makes any award of attorney fees, the requesting party bears the burden of establishing the reasonable amount of those fees, including meeting stringent criteria that demonstrates that services performed by non-

attorney staff personals are properly compensable and that all services performed by staff and attorneys were legal in nature, of reasonable duration, and charged at a reasonable rate. *Berryman v. Metcalf*, 135 Wn. App. 644, 657, 312 P.3d 745 (2013); *Absher Const. Co. v. Kent School Dst. No. 415*, 79 Wn. App. 841, 845, 917 P.2d 1086 (1995). Washington courts' primary method of determining the reasonableness of attorney fee awards is the *lodestar* method. See e.g. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983).

Under the *lodestar* method, Washington courts *must*: (1) evaluate whether the number of hours expended was reasonable, (2) evaluate whether the hourly rates charged were reasonable, and (3) multiply the reasonable hours expended by a reasonable hourly rate to reach the *lodestar* fee. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993). Nonetheless, the *lodestar* fee "is only the starting point and the fee thus calculated is not necessarily a reasonable fee." *Absher*, 79 Wn. App. at 847. In determining if the number of hours expended were reasonable, the court should consider the number of hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time and should exclude such time from any fee award. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983); *Deep Water*

Brewing, LLC v. Fairway Resources Ltd., 152 Wn. App. 229, 282, 215 P.3d 990 (2009).

Moreover, fees for services performed by non-attorney personnel may be included in an award of attorney fees *only* if stringent criteria are met by: (1) demonstrating that the services performed by the non-lawyer personnel were legal in nature; (2) the performance of the non-lawyer personnel's services was supervised by an attorney; (3) enumerating the qualifications of the personnel performing the services in sufficient detail to demonstrate that the person is qualified by virtue of education, training, or work experience to perform substantive legal work; (4) setting forth the nature of the services performed to allow the court to determine that the services performed were *legal in nature rather than clerical*; (5) establishing that the amount of time expended was reasonable; and (6) demonstrating that the amount charged reflects reasonable community standards for that category of personnel. *Absher*, 79 Wn. App. at 845.

Here, the trial court erred as a matter of law in treating RCW 11.96A.150 as a mandatory, prevailing party attorney fee provision. *See* RP at 35-40. Instead, awards of attorney fees under RCW 11.96A.150 must be guided by the equitable principles of TEDRA and are not linked to a prevailing party standard. *See supra*. Thus, the trial court's awards of

attorney fees and costs to Mr. Carver and Riverview should be reversed based on the trial court's misapplication of RCW 11.96A.150.

Further, the trial court's awards of attorney fees and costs to Mr. Carver and Riverview should also be reversed because neither Mr. Carver nor Riverview met their burden of establishing the reasonable amount of their compensable attorney fees and costs and the trial court erred by failing to carefully scrutinize their fee requests on the record. For example, Mr. Carver's request for \$34,857.76 in attorney fees included at least \$10,172.52 in non-compensable fees, including: (1) \$1,650.00 worth of attorney time devoted to clerical tasks like calendaring depositions and retaining an interpreter; (2) \$4,875.00 worth of non-attorney staff time devoted to non-legal clerical tasks; (3) duplicative attorney time totaling \$1,380 attributable to preparing for and attending the deposition of Riverside employee Collette Tynan; (4) \$47.80 in photocopy costs; (5) \$27.38 in postage costs; (6) \$153.62 in computer legal research costs; and (7) \$2,038.72 in mileage, interpreter, and transcription costs. *See* CP at 476-93. Although the trial court exercised its discretion to reduce the hourly rate for Mr. Carver's counsel to \$300 (from \$375), the trial court failed to address these issues either on the record or in its written findings and the record fails to show that the trial court conducted any *lodestar* analysis whatsoever. Nonetheless, the trial court erroneously entered

without analysis findings that all the fees awarded were “reasonable” and that the “work done was not unnecessary, duplicative, or clerical in nature.” CP at 630-31. These findings are not supported by the record and the trial court’s award of fees and costs in favor of Mr. Carver should be reversed.

Similarly, the record fails to show that the trial court conducted a *lodestar* analysis with respect to Riverview’s request for \$18,121 in attorney fees and costs. Further, the trial court overlooked the fact that \$5,023.50 of Riverview’s request is clearly not compensable, as it is comprised of: (1) \$1,702.50 in fees attributable to duplicative services, including conducting file reviews, taking file notes, reviewing deposition transcripts, and preparing case summaries; (2) \$1,247.50 in fees attributable to communicating with Riverview’s insurers regarding its coverage and making regular case reports and depositions summaries to insurers; (3) \$632.50 in fees attributable to attorneys performing work that is clerical in nature rather than legal in nature including scheduling depositions; and (4) \$1,441 in transcription costs. CP at 578-87. Moreover, although Riverview’s counsel included travel time in its billings, it failed to differentiate the amount of attorney time devoted to travel rather than substantive legal work. *See id.* Thus, this court should reverse the award of fees and costs in favor of Riverview.

D. This court should award Ms. Prom her reasonable attorney fees on appeal.

Where a party has a basis for an award of reasonable attorney fees and costs below, this court may make an award of reasonable attorney fees and costs on appeal under RAP 18.1. RCW 11.96A.150 grants Washington courts authority to award attorney fees in disputes involving trusts, estates, and nonprobate assets as the equities demand.

Here, should this court grant Ms. Prom relief, it should also award her reasonable attorney fees and costs incurred on appeal under RAP 18.1 and RCW 11.96A.150.

VI. CONCLUSION

Because the trial court permitted Mr. Carver and Riverview to raise new arguments on reply and in oral argument, misapplied the summary judgment standard, ignored multiple genuine factual disputes and concessions by Mr. Carver and Riverview, and misinterpreted the law, this court should reverse the orders granting summary judgment in favor of Mr. Carver and Riverview and should remand for trial.

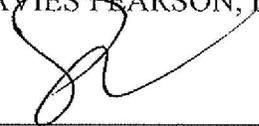
As the trial court's errors were so egregious, this court should also hold that the trial court abused its discretion in denying Ms. Prom's motion for reconsideration of the trial court's summary dismissal of Riverview.

Further, because the trial court improperly applied RCW 11.96A.150 as a mandatory, prevailing party standard—rather than an equitable standard—and then, as a litigation afterthought, awarded Mr. Carver and Riverview substantial sums in attorney fees in costs without conducting a *lodestar* analysis and without actively analyzing the reasonable, compensable amount of such awards, this court should reverse the attorney fee and cost awards in favor of Mr. Carver and Riverview.

Lastly, this court should exercise its discretion and award Ms. Prom her reasonable attorney fees on appeal.

DATED this 20th day of July 2015.

DAVIES PEARSON, P.C.



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CERTIFICATE OF SERVICE

Under penalty of perjury under the laws of the State of Washington, I declare that on this 20th day of July 2015, a true copy of this document was served via e-mail and/or U.S. Mail on:

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