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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Ted Spice,
Appellant,
vs.

ESTATE OF DORIS MATHEWS, DONNA DUBOIS as
personal representative of the Estate, MARK DUBOIS, a purported agent
of the Estate, DORIS ELAINE MATHEWS LIVING TRUST,
Respondents

APPELLANT'S OPENING BRIEF

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INTRODUCTION

Appellant, Ted Spice (“Spice”), respectfully submits this brief seeking reversal of the Superior Court’s order dismissing his claims against the Estate of Doris Mathews, Donna Dubois as personal representative of the Estate, Mark Dubois, a purported agent for the Estate, and Doris Elaine Mathews Living Trust (collectively referred to as “the Estate”) in Pierce County Superior Court under Cause number, 17-2-06511-6, consolidated with Cause number, 10-4-00037-5. That order under review was based upon a motion for dismissal heard as a motion for Summary Judgment. Genuine issues of material fact exist, especially based on this Court’s prior ruling remanding a continuing waste claim back to the Superior Court for further proceedings.

Spice also seeks review of an order of one Superior Court Judge overruling another judge concerning notice of disqualification¹, a Superior Court Judge whose judicial assistant brought about an appearance of bias, and an order from the transferring real property from the Estate of Doris Mathews, which was co-owned with Spice, to Donna Dubois co-owned by Spice with. Further, Spice seeks review of a finding that he is a vexatious litigant.

¹ Formerly known as an Affidavit of Prejudice.

The issues consist of review regarding claims of fraud, fraudulent transfer, continuing waste, agent acting without authority, failure to provide litigation and development fees and costs based on litigation of an easement benefitting the property.

I. IDENTITY OF APPELLANTS

Appellant Ted Spice is an individual residing in Washington State.²

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it determined no material issues of fact were present at the Motion to Dismiss/Summary judgment.
2. The trial court erred when it dismissed continuing waste claim and liability as agents from the Amended Complaint.
3. The Court erred when it failed to vacate the trial court's order despite a conflict of interest with a judicial assistant with a potential personal interest in the sale of the properties at issue.
4. The Court erred when it denied the motion for reconsideration, thus affirming the authorization of the sale of properties, including Spice's interest.
5. The Court erred when it failed to recognize that the Bankruptcy discharge does not prevent certain claims from being pursued in State Court.

² Plaintiffs Pavel Pasyuk and Plexus Investments LLC did not appeal.

6. The trial court erred in its implication that there was no subject matter jurisdiction to hear these matters at the Trial Court.
7. The Trial Court erred when it designated Spice as a “vexatious litigant.”
8. The Trial Court’s order was overly broad, essentially denying access of Spice to any Court, including Federal Court and Bankruptcy Courts without Pierce Court Superior Court’s approval.
9. The Trial Court erroneously allowed one Superior Court Judge to overrule another judge regarding a notice of disqualification.
10. The Trial Court erred in improperly restoring non-intervention powers to Respondent Donna Dubois and authorizing the sale of property owned by Spice without considering Respondent’s prior conduct.
11. The Trial Court erred when it dismissed the fraudulent misrepresentation and fraudulent transfer claims from the Amended Complaint.
12. The Trial Court erred in awarding attorney’s fees to the Estate.

III. STATEMENT OF ISSUES

1. Whether despite material issues of fact presented before the Trial Court, the Judge properly dismissed the continuing waste and liability as agents claim from the Amended Complaint?
2. Whether receiving notice of a potential conflict of interest prior to ruling was in violation of the Judicial Canons and failure to disclosure a conflict required the Trial Court to vacate the ruling?
3. Whether despite Respondents' bad acts and the conflict issues the Trial Court erred in its denying the motion for reconsideration?
4. Whether the Trial Court erred in its ruling that Spice violated Bankruptcy laws, despite clear law allowing the pursuit of certain claims not excluded?
5. Whether the Trial Court erred in its determination that no the Court held no Subject Matter Jurisdiction?
6. Whether the court erred in its order based on determining a single action that was ultimately deemed frivolous is a basis for an injunction against further filings, despite no showing of a pattern of abusive and frivolous actions by Spice?
7. Whether the court erred in the order by requiring the Pierce County Superior Court's approval for any filing of a lawsuit, including Federal Court and Bankruptcy Court?

8. Whether, despite no authority to do so, one Superior Court Judge can *sua sponte* expressly overrule another superior court judge based on a Notice of Disqualification?
9. Whether an estate can transfer its only assets, which it co-owns with a creditor, to its heirs to be sold in the personal bankruptcy proceeding involving the heirs?
10. Whether the court erred when it dismissed the fraudulent misrepresentation and fraudulent transfer claims from the Amended Complaint?
11. Whether the court erred in awarding attorney's fees to Respondent for the Motion to Dismiss/Summary Judgment?

IV. STATEMENT OF THE CASE

A. Initial litigation

On September 17, 2012, Pierce County Superior Court under Cause no. 10-2-11622-8 entered a jury verdict awarding Spice and, Respondent, Donna Dubois, interest in real property. CP 1294. The order granted Spice legal title as follows:

1. 11003 58th Street, Puyallup, Washington, 25% to Spice and 75% to the Estate;

2. 11305 58th Street, Puyallup, Washington, 100% to the Estate. However, Spice eventually recovered a 33% interest in the property, which he continues to hold;

3. Kitsap County, tax parcel 292602-1-045-2004, 50% to Spice and 50% to the Estate;

4. 11319 58th Street, Puyallup, Washington, 100% to Spice;

5. Winlock Land and Napavine Land, 100% to Spice.

CP 1294. The 11003 58th Street, Puyallup, Washington refers to the following four addresses:

- 11003 58th Street Court East, Puyallup, WA,
- 11004 58th Street Court East, Puyallup, WA,
- 11007 58th Street Court East, Puyallup, WA,
- 11011 58th Street Court East, Puyallup, WA,

(hereinafter collectively “11003 Property”). CP 1293.

B. Underlying lawsuit to this appeal

The issues from the present appeal stem from cause number 17-2-065116, consolidated with 10-4-00037-5, Estate of Doris E. Mathews. CP 1186. On June 13, 2017, Spice filed an Amended Complaint including, fraud, fraudulent transfer, agent acting without authority, failure to provide litigation and development fees and costs based on litigation of an easement benefitting the property, and continuing waste based on failure

to repair, remodel, or otherwise rehabilitate the properties so that the properties could be rented. See CP 352-68.³

On August 23, 2017, the Estate filed a Motion to Dismiss cause number 17-2-06511-6, noting the motion at least 28 days later and the trial court subsequently converted the motion to a summary judgment stating, “there were matters referenced outside of the pleadings, so I do think this is properly addressed as a CR 56 motion. So just so the parties know, that’s the way I’m addressing it....” RP October 24, 2017 RP 4:8-12, CP 1256.

The motion asserted that the claims are barred by the bankruptcy discharge, lacked subject matter jurisdiction, *res judicata* and/or collateral estoppel, statute of limitations and *laches*, no fees owed, transfer of properties was proper, alleged that Spice is a “vexatious litigant” and sought attorney’s fees. See generally CP 1259-1270. The Superior Court entered an order dismissing a portion of the actions on October 24, 2017 and subsequently dismissed the remainder of the actions on or about December 1, 2017 via Court order. CP 1691-92.

In addition to dismissal, the Court provides an absolute bar “from filing any new lawsuits for any subject matter arising out of or against the Estate, or any other defendants, including Donna Dubois, Mark Dubois, or

³ The proposed Amended Complaint was the filed Amended Complaint. CP 352

Doris Elaine Mathews Living Trust” the defendants “unless *approved by the Court*, and only after providing all previously filed Superior Court, Appeals Court, and bankruptcy court complaints, dismissals, final orders and decisions, and this Order. (emphasis added). CP 1692. Mr. Spice and any legal counsel acting on his behalf, must demonstrate a *prima facie* case that any such lawsuit is brought in good faith and in compliance with court rules.” CP 1692.

C. Relevant litigation history

Pierce County cause no. 13-2-09887-9, also consolidated with cause 10-4-00037-5, was pursuant to a denied creditor’s claim filed against the *Estate of Doris Mathews*. CP 1294. The claim included breach of an oral contract for services rendered, *quantum meruit*, breach of fiduciary duty for misappropriating partnership funds, malfeasance and unlawfully converting Plexus operating capital by committing willful and/or wanton waste with respect to the properties, plus a fourth cause of action was for waste. CP 1294-95.

That case was originally dismissed at summary judgment. However, on December 12, 2017, the Court of Appeals entered an unpublished decision on the creditors claim matter *Ted Spice v. Estate of Doris Mathews*, Court of Appeals of the State of Washington, Division One, No 48458-7-II. (A copy of the Opinion is attached as **Appendix A**).

This Court reversed the grant of summary judgment on the issue of breach of fiduciary duty by allowing waste, and reversal of the award of attorney's fees to the Estate. Appendix A, 14,17. Notably, this establishes jurisdiction at the Pierce County Superior Court as proper regarding these issues.

The US Bankruptcy Court Trustee, Brian Budsberg, filed an action against Spice under the Dubois' Bankruptcy. Spice did not initiate this matter; however, the lawsuit attempts to sell Spice's interests to the property, without partition. CP 1294, 1348, 1375. The Trustee specifically alleges, "[t]he properties debtor owns jointly with Defendant are not partitionable and the estate would realize much less from a sale of the Debtor's interests in the property [sic] than from the sale of the properties free and clear of Defendant's co-ownership interests." CP 1384. Because the Trustee incorrectly asserted, "As the Defendant does not live in any of the properties, there is no detriment to him in the sale free and clear of his ownership interests." CP 1384. Spice does, **in fact**, reside on the property and claims it as his homestead. (emphasis added). CP 1346. In addition, Spice also spent over \$1.7 million attempting to protect these properties over the past decade. CP 1347. To protect his interest in the assets and investments, Spice filed a counterclaim. CP 1349.

D. Chapter 7 bankruptcy discharge for Donna and Mark Dubois

In September 2013, Respondents, Donna and Mark Dubois, petitioned for Chapter 7 bankruptcy protection in the United States Bankruptcy Court, Western District of Washington under Case number 13-46104-BDL. CP 1346. On May 3, 2016, an order was entered discharging Respondent, Dubois', debt. CP 1381.

However, Spice is not listed on the Bankruptcy Petition as a secured creditor or a co-owner of any of the properties. CP 1402-1406. The order further lists other debts that are not discharged. CP 1281-82. The Order of Discharge states, "However, a creditor with a lien may enforce a claim against the debtors' property subject to the lien unless the lien was avoided or eliminated. While there was a discharge to Respondents Mark and Donna Dubois in the Bankruptcy Court, the discharge did not address prior liens to the property. CP 1281-82."

E. Transfer of real estate authorized by the trial court

On March 31, 2017, Hon. Kirkendoll entered her ruling restoring non-intervention powers and allowing transfer of real estate and denying Ted Spice's Motion for Stay. CP 707-09. Subsequently on May 1, 2017, Spice filed a Memorandum in Support of Recusal of Honorable Karena Kirkendoll. CP 1447-48 requesting recusal and that the court vacate its March 31, 2017 ruling. The basis of the motion concerned Hon. Kirkendoll's Judicial Assistant, Ms. Bartelson, having a familial

relationship (or being an actual involved party, which it was first believed) with an opposing party of Spice who has been adjudicated as having trespassed against Spice and also being a potential buyer of one of the co-owned properties. CP 1439-40. Hon. Kirkendoll recused herself post-decision due to a motion regarding the potential bias of the Judicial Assistant but did not vacate the order transferring the property.

V. ARGUMENT

A. Standard of review.

Review of a trial court's order granting or denying summary judgment⁴ is de novo and the Court should engage "in the same inquiry as the trial court, which is to consider all facts submitted as contained in the record and reasonable inferences therefrom in favor of the nonmoving party." Phillips v. King County, 968 P.2d 871, 136 Wn.2d 946, 956 (1998). The Standard of review for Review for Motions for Reconsideration is abuse of discretion. Lilly v. Lynch, 88 Wn.App 306, 321, 945 P.2d 727 (1997). (citation omitted). "When reviewing an award for attorney fees, the relevant inquiry is first, whether the prevailing party was entitled to attorney fees, and second whether the award of fees is reasonable." Elthridge v. Hwang, 105 Wn.App 447, 460, 20 P.3d 958 (2001). Review

⁴ Although designated a motion to dismiss the trial court treated the Estate's motion as one for Summary Judgment. See CP 1582.

of the court's decision to grant or deny attorney's fees are viewed *de novo*.

Id. The amount of a fee award is reviewed for abuse of discretion. Id.

B. The Trial Court committed error in dismissing Spice's complaint for ongoing waste.

- i. Spice's claim for ongoing waste requires reversal based upon a prior ruling of this Court remanding a similar claim for trial.

A triable issue of fact exists regarding ongoing waste. The trial court's ruling dismissing ongoing waste appears to rely on a prior claim being dismissed by Hon. Culpepper. October 27, 2017 RP 33-34. At the motion for summary judgment, Hon. Ashcraft stated, "But here we've got a ruling by Judge Culpepper that there was no waste, and therefore how is there—how is there a continuing tort with regard to a cause of action that Judge Culpepper dismissed as being not meritorious?" October 27, 2017 RP 33:13-16.

On December 17, 2017, this Court reversed the decision of Hon. Culpepper stating, "Spice argues that the trial court erred by dismissing his claims for waste against the Estate because he and the Estate were in a fiduciary relationship with respect to the management of the co-owned property. We agree." Appendix A p. 12.

The ruling was based upon the fact that Spice and Estate were in a quasi-fiduciary relationship. “Accordingly, ...we hold that the Estate and Spice were in a quasi-fiduciary relationship with regard to the avoidance of waste in management of the co-owned properties. Appendix A. p. 14. The fiduciary relationship stems from the fact that Spice was barred from being involved in the management of the co-owed properties, leaving Spice reliant on the Estate’s supervision of the properties. Appendix A. p. 14. In a fiduciary relationship, one party ‘occupies such a relationship to the other party as to justify the latter in expecting his interests will be cared for.’ Kitsap Bank v. Denley, 177 Wn.App 559, 574, 312 P.3d 711 (2013). Appendix A. p. 12. This is the same relationship between Spice and the Estate, as Spice must rely on the Estate to care for his co-owned interests in the real property.

Spice and at a minimum the Estate, are in a quasi-fiduciary relationship. This ruling and the reliance by Hon. Ashcraft on Hon. Culpepper’s now reversed decision, requires remand of the issue of waste for further proceedings to determine the continuing waste issue.

- ii. The statute of limitations allows for the commencement of waste within three years from when the tort begins.

The tort of waste, is one of the few remedies Spice has to hold the Estate accountable for their continued failure to rehabilitate, repair,

remodel and ultimately mismanage the property, resulting in substantial injury. “Waste as understood in the law of real property and as variously defined by [our Supreme Court] is an unreasonable or improper use, abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession which results in its substantial injury.” Appendix A p. 12 (citing Graffell v. Honeysuckle, 30 Wn.2d 390, 398, 191 P.2d 858 (1948)). Appendix A p. 12. The statute of limitations is three years, which runs from the date the tort begins. RCW 4.16.080 and Woldson v. Woodhead, 159 Wn.2d 223, 149 P.3d 361 (2006).

This Court has already reviewed the initial facts in this case, stating, “On December 21, 2012, the trial court granted Spice’s motion of for an order appointing a property manager to manage the disputed properties. Although Spice made the motion for the court to appoint a property manager, the court ordered that “[t]he personal representative [of the Estate] shall make best efforts to hire a property management company on or before January 1, 2013. Then, on March 29, 2013, the trial court enjoined Spice from being involved in any of the property management duties on any of the properties that were co-owned by Spice and the Estate that were involved in the litigation.” Appendix A p. 13.

Waste continues on the properties and Spice requires a remedy to hold Respondents accountable. Like the tort of trespass, continuing waste

should be allowed in “successive suits...to remedy such injuries until the trespass ceases.” Woodland 159 Wn.2d at 223. Otherwise, the Estate can simply refuse to comply leaving Spice no remedy.

iii. Specific acts by the Estate are ongoing

The present lawsuit seeks damages for waste which are allowed both as co-tenant and creditor. Specifically, for the failure to repair, remodel, or otherwise rehabilitate the properties causing a decrease in rental value. CP 368. For example, the Report provided by Norma Woods, of Elite Tax and financial Services, LLC, details the failure of the estate in August 8, 2017, to process a check for insurance based on a fire in 11004 (one of the collective properties under 11003), thus leaving the property in disrepair and unrentable, and with the resulting in “five of the seven units uninhabitable.” CP 1390. The issue of waste requires further inquiry at the Superior Court, such that Spice is compensated for the waste caused by the Estate. Based on these facts, there are clearly issues which, when viewed in the light most favorable to Spice, preclude dismissal and require remand to the Superior Court.

C. Additional fiduciary duties are owed by Donna and Mark Dubois who both exceeded their authority.

Respondents, Donna and Mark Dubois, both acted in a manner exceeding their authority and should be held personally accountable for

their actions. An agent representing authority which exceeds his actual authority is personally responsible. See Glendale Realty v. Johnson, 6 Wn.App 752, 756, 495 P.2d (1972). Evidence was proffered by Spice below that Respondent, Mark Dubois, signed and executed the Real Estate Tax Affidavits as an “agent” for the Estate, without proper authority. CP 1344. Additionally, that Respondent, Donna Dubois, transferred properties without non-intervention powers to do so, in violation of a court order. CP 1344.

When Respondents Mark and Donna Dubois take actions personally and without actual and apparent authority, they should be held personally responsible for any actions they willingly make. Here, actions attempting to interfere or mislead the actions of the Trustee regarding the insolvency of the properties by Donna and Mark Dubois should result in personal liability in which they are accountable to Spice. CP 1348. This issue should be remanded for further proceedings based on the Respondent’s actions.

D. The bankruptcy discharge did not discharge all of Spice’s claims and Spice did not ignore the discharge.

There are limits as to what a bankruptcy discharge allows. CP 1381. The December 1, 2017 order granting Summary Judgment by Hon. Ashcraft claims that “Mr. Spice has not acted in good faith and ignored a

bankruptcy discharge.” CP 1960. The implication of statement that Spice has no right to pursue any further legal matters that were in bankruptcy court, which is an error of law.

Spice asserts that fraudulent transfers took place which are not dischargeable in Bankruptcy Court. Specifically, 11 USC 523(a)(2) provides that fraudulent transfers of real property are not dischargeable. The bankruptcy discharge also does not discharge “debts that the Bankruptcy Court has decided or will decide are not discharged in this bankruptcy case, and most taxes”. CP 1382. It is also notable that the discharge states that, “a creditor with a lien may enforce a claim against the debtors’ property subject to that lien unless the lien was avoided or eliminated.” CP 1381.

Nowhere in the bankruptcy code does it account for a discharge of the taxes owed by the Respondents, nor the co-owned property issues with Spice. Furthermore, RCW 11.04.250 provides that Spice, as a grantee, “may sue for and recover their respective shares or interests in such lands, tenements, or hereditaments and the rents, issued, and profits thereof...” RCW 11.04.250. Spice not only owns an interest in the property but paid almost \$1.7 million in improvements, pre-development and litigation costs, and benefits to the property. CP 1347. See also CP 358. Spice is owed substantial federal and state tax liabilities from Respondents, as well

as litigation costs to dispute an easement benefitting the properties. CP 362. In support of this *lis pendens* are on the property securing his interests. CP 1407-22. Spice is not denied a remedy to these issues simply because a discharge occurred without his claims listed on the Petition or referenced in a discharge. Additionally, his claims are in no way a violation or a disregard to the bankruptcy order. As a result, the ruling and its ramifications require reversal.

E. The trial court had subject matter jurisdiction to hear the underlying matter.

The motion to dismiss filed by Respondent asserted 12(b)(1) that there was no subject matter jurisdiction at the Superior Court. This matter was not specifically addressed in the Orders, however it is implied that the matter should be strictly before the Bankruptcy Court, "...the Court further notes that there is ongoing litigation in the bankruptcy court that addresses at least some of the issues and in which Mr. Spice can make many of the arguments he is currently making in the latest Complaint." CP 1680. Because of this language and the numerous references to subject matter jurisdiction, Spice seeks reversal of any decision by the trial court regarding subject matter jurisdiction pertaining to the present litigation.

It is very clear via statutory law that the Superior Court has jurisdiction on estate matters. Under RCW 11.04.250, the Court can

determine the respective rents and profits of the properties owned as co-tenants. See RCW 11.04.250. It is also notable that as previously stated in this brief, Hon. Culpepper's decision was remanded back to the Superior Court, thus, again, invoking Pierce County Superior Court jurisdiction. Appendix A, p. 14. The Court determined that the trial court's decision to give the Estate responsibility for selecting a property manager and subsequently precluding the Spice from being involved created a *quasi-fiduciary* relationship. See Appendix A, p. 14. Therefore, any decision entered by Hon. Ashcraft pertaining Subject Matter Jurisdiction should be reversed.

F. Spice has repeatedly prevailed in his litigation against the Estate and cannot be a vexatious or abusive litigant.

The trial court granted the Estate's motion to enjoin further litigation from Spice against the Estate. CP 1659 (December 1, 2017 order). In so doing the Court indicated that it reviewed the procedural history including a jury trial, appeal (Court of Appeals Div. II No. 44101-2 (affirming the jury trial)), a second lawsuit that was dismissed, a second appeal (Court of Appeals Div. II No. 48458-7 (reversing the dismissal)),⁵ referenced two other lawsuits that had been voluntarily dismissed by

⁵ At the time the trial court rendered its decision the second appeal had not been decided – that decision came less than two weeks later.

Spice, an adversary proceeding in bankruptcy, and the lawsuit which is the subject of this appeal. CP 1656-57.

Having reviewed that history the trial court concluded:

Spice has engaged in a pattern of abusive and frivolous litigation. This includes the filing of multiple lawsuits against the Defendants related to the Estate ...despite a jury trial and a verdict sustained on appeal, and despite having brought other claims that were dismissed either voluntarily or by summary judgment, Mr. Spice filed this lawsuit asserting the same claims and causes of action he's previously asserted. Mr. Spice has not acted in good faith and ignored a bankruptcy discharge. As a result of Mr. Spice engaging in a pattern of abusive and frivolous litigation, he is found to be a vexatious litigant.

CP 1658 (emphasis added).

Based on this finding the Court enjoined Spice from filing any litigation unless approved by Pierce County Superior Court. See CP 1659. Spice appeals asserting that he is not a vexatious litigant due to being repeatedly successful in his litigation against the Estate, having relied on expert witnesses, generally being represented by counsel, and acting in good faith. Furthermore, the injunction issued is overly broad and prohibits access to federal courts.

i. Standard of review

Review of “a trial court's order limiting a party's access to the court” is based on an abuse of discretion. See Bay v. Jensen, 147 Wn. App. 641, 657 (2008).

ii. Spice has not engaged in abusive litigation

Due Process requires at least “a reasonable right of access--a reasonable opportunity to be heard.” Ciccarelli v. Carey Canadian Mines, Ltd., 757 F.2d 548, 554 (3d Cir.1985). In other words, Due Process requires at least that “absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.” Boddie v. Connecticut, 401 U.S. 371, 377, 91 S.Ct. 780, 785, 28 L.Ed.2d 113 (1971). “[I]mplicit in the right of access to the courts” is that “litigation proceed in good faith and comply with court rules.” In re Marriage of Giordano, 57 Wn.App. 74, 77, 787 P.2d 51 (1990).

In In re Marriage of Giordano, Division 1 looked to a 7th Circuit, 2nd Circuit, a W.D. MO federal district case, and Colorado v. Carter, 678 F.Supp 1484, 1486 (D.Colo.1986), which the court found “in particular...[to be]compelling authority,” “for the proposition that a court may, in its discretion, place reasonable restrictions on any litigant *who abuses the judicial process.*” Giordano at 78 (emphasis added). The court conceded in a footnote “this Court previously found no authority for such relief.” Id. n.1 referencing (Bramall v. Wales, 29 Wn.App. 390, 394-95, 628 P.2d 511 (1981)). In restricting access to the courts there should be a “specific and detailed showing of a pattern of abusive and frivolous

litigation.” Yurtis v. Phipps, 143 Wn.App. 680, 693, 181 P.3d 849 (2008). “Proof of mere litigiousness is insufficient to warrant limiting a party's access to the court.” Id.⁶

Carter involved a *pro se* litigant with a lengthy history of filing at least 15 cases. 678 F. Supp. at 1486. Most were dismissed as frivolous or lacking subject matter jurisdiction. Id. Among the myriad of absurd cases was a federal action that was something resembling an appeal of a state court matter, a lawsuit against a county clerk for *inter alia* misfiling a notice of appeal, a lawsuit against a district court judge for defamation in a legal opinion, numerous lawsuits challenging his general discharge from Air Force, a motion for relief from judgment more than a year after an appellate court affirmed the judgment, lawsuit alleging unpaid salary from Air Force wherein he named a specific General of the Air Force, and a lawsuit against the director of the DEA based on an alleged assignment from one who had property seized by DEA. Id. Appx. A.

In re Marriage of Giordano involved post-dissolution motions to enforce an agreed dissolution order. 57 Wn.App. at 75. “The number of motions threatened to preempt the family law motions calendar and to involve all 39 superior court judges.” Id. Thus the trial court set the matter

⁶ This is somewhat obvious considering the amount of litigation, which is not frivolous or abusive, filed by governmental agencies tasked with using the courts to effectuate their agency mission such as prosecutors or the attorney general's office.

for trial and issued a moratorium barring motion that did not prevent emergency motions. Id. During the 4 month moratorium there were 12 motions filed and at trial another 5 motions were brought. Id. at 75-76. The case resulted in “an unprecedented 13 volumes of files.” Id. at 76.

Spice, by deep contrast, began his dispute with the Estate (and never had a dispute with the decedent) to enforce a promissory note alleging “conversion, tortious interference, breach of fiduciary duty, and frivolous litigation.” See Spice v. DuBois, No. 44101-2-II (Unpublished March 2016).⁷ In that first case a jury rendered a verdict in favor of Spice in some measures and in favor of the Estate in others such that on appeal this Court determined that neither party was the substantially prevailing party. Id. Therefore, that case could not have been frivolous or brought in bad faith as the jury at trial awarded Spice interest in several properties. Id.

The next dispute arose on a theory of waste committed by the Estate and for payment of wages as a property developer. See Spice v. Estate of Mathews, 48458-7-II (Unpublished December 2017).⁸ The matter was dismissed at summary judgment by the trial court, but this

⁷ As an unreported case the matter has no precedential value but does act as a record reflecting a portion of the relevant procedural history.

⁸ Spice filed two other matters that he voluntarily dismissed upon incorporating into the case addressed by this Court in 48458-7-II. See CP 1257 (referencing the voluntary dismissals).

Court partially reversed on one of the primary issues. Id. Furthermore, the trial court in the second action found that Spice prevailed in some of his motions. Id. see also CP 572-73 (summary of various motions). The second case, therefore, could not have been frivolous or brought in bad faith as this Court found, at least, a “genuine issue of material fact that preclude[s] dismissal” exists. Id.

Spice’s third state court⁹ matter is this subject of this action. The trial court granted the injunction premised upon the finding that there was a “pattern of abusive and frivolous litigation.” CP 1658. Against the backdrop of the first case being found neither in favor of the Estate or Spice and the second case remaining undecided there can be no pattern of abusive or frivolous litigation. There are no references to Spice having flaunted court rules. There are no findings of contempt against him. The trial court did not make a “specific and detailed showing of a pattern of abusive and frivolous litigation.” Yurtis v. Phipps, 143 Wash.App. 680, 693, 181 P.3d 849 (2008). At worst Spice has brought one action, the instant one, that has been found to be frivolous.

iii. A State Court Cannot Enjoin Access to Federal Courts

⁹ Spice instituted a counterclaim in a bankruptcy matter. CP 1258. The record does not reveal any conclusion or relevant rulings pertaining to the matter. The trial court below indicated that the claims in this action could be asserted in the bankruptcy matter, which, at least, indicates that the trial court did not find that the bankruptcy counterclaim was frivolous or brought in bad faith. See CP 1582.

The trial court's injunction provides an absolute bar "from filing any new lawsuits for any subject matter arising out of or against" the defendants "unless approved by the court, and only after providing all previously filed [court complaints and orders and demonstrating] a prima facie case that any such lawsuit is brought in good faith and in compliance with court rules." CP 1659 (December 1, 2017 order).¹⁰ The trial court's letter decision had stated that further litigation would require "approval of *the Court.*" CP 1582 (emphasis added). The trial court's order thus appoints Pierce County Superior Court as a courthouse gatekeeper preventing Spice from filing litigation anywhere.

In In re Marriage of Giordano, 57 Wn.App. 74, 79-80, 787 P.2d 51 (1990) the Court of Appeals recognized:

Under the Supremacy Clause, U.S. Const. art. 6, [2] state courts are without power to enjoin litigants from filing federal actions. See *General Atomic Co. v. Felter*, 434 U.S. 12, 98 S.Ct. 76, 54 L.Ed.2d 199 (1977), applying rule of *Donovan v. Dallas*, 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964). "Federal courts are fully capable of preventing their misuse for purposes of harassment." *General Atomic*, 434 U.S. at 19, 98 S.Ct. at 79. *Donovan* was "premised on the fact that the right to litigate in federal court is granted by Congress and, consequently, 'cannot be taken away by the State.'" *General Atomic*, at 16, 98 S.Ct. at 78, quoting *Donovan*, 377 U.S. at 413, 84 S.Ct. at 1582.

¹⁰ The Pierce County Superior Court Clerk's office inadvertently designated the December 1, 2017 order as 1654-1655. The order is 6 pages long. Subsequent Clerk's Papers are, therefore, incorrectly labeled as well. However, the subsequent Clerk's Papers are limited to the notices of appeal.

The right to pursue federal administrative remedies is also granted by Congress, and, therefore, is similarly protected.

Because the trial court enjoined or impliedly enjoined federal court filings this portion of the injunction should be reversed.

G. Despite an issue of potential bias and conflict Hon. Kirkendoll proceeded to enter an order and refused to vacate it after the conflict was brought to her attention.

On March 31, 2017, Hon. Karena Kirkendoll entered a ruling restoring the personal representative's non-intervention powers, allowing transfer of real estate and denying Spice's Motion for Stay. CP 707-09. This is despite the fact that it was discovered that her Judicial Assistant was potentially involved in litigation with Spice. March 31, 2017 RP 17:5-16.

On May 1, 2017, a Memorandum of Law was filed on behalf of Spice establishing that "Jennifer Bartelson is involved in some of these real estate transactions in this and other easement waterline trespass litigation and she is the Judicial Assistant for Hon. Kirkendoll." CP 814. Despite this, Hon. Kirkendoll refused to vacate the order but recused herself from further litigation. Hon. Kirkendoll determined "that although there is no mandatory reason for the Judge's recusal, she will voluntarily

recuse.” CP 897. A Declaration filed by Jennifer Bartleson, admitted that her brother-in-law was involved in the litigation but denied any involvement. CP 926. The matter was not brought before the parties to determine concerns until discovered at the actual hearing. March 31, 2017 RP 17:5-16. The Judicial Canons require a Court free of bias. “A Judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially.” CP 1454. (*quoting* Canon Rule 2.2). Additionally, “A judge shall require Court staff, Court officials, and others subject to the Judge’s direction and control to act with fidelity and in a diligent manner consistent with the Judge’s obligations under this code.” CP 1455 (*quoting* Canon Rule 2.12). Here, the fact that a Judicial Assistant had family members involved in litigation pertaining to Spice should have been brought to the attention of Spice. The disclosure allows all parties notice and opportunity to voice concerns and ensure that there is no bias or impartiality by the Court or its staff. The decision not to withhold a decision based on the familial connection of the Judicial Assistant and subsequent refusal to vacate was substantial error by the Court.

H. Spice was deprived of his statutory right to disqualify a judge from hearing his matter under RCW 4.12.050.

This matter proceeded through various judges. Hon. Kirkendoll voluntarily recused herself on May 12, 2017 following a request by Spice for disqualification based upon an apparent familial relation between her judicial assistant and a litigant in an unrelated matter involving Spice. CP 987-88. In May 2017, Hon. Blinn was assigned the matter. CP 1213. Spice filed an affidavit of prejudice under RCW 4.12.050, which Hon. Blinn honored. CP 1210-11, 1213. Hon. Blinn found Spice’s affidavit of prejudice to be timely (i.e. that no discretionary ruling had been made under RCW 4.12.050 (1)(a)) and that the request for recusal of Hon. Kirkendoll was not based on RCW 4.12.050. See July 14, 2017 RP 5:15-25 (overruling Estate’s argument that Spice had already exercised his statutory right to disqualification by highlighting the distinction between a statutory affidavit of prejudice¹¹ and a motion for recusal).

The matter was thereafter re-assigned to Hon. Cuthbertson. Remarkably, by letter decision on August 10, 2017, Hon. Cuthbertson *sua sponte* issued an order overruling Hon. Blinn, finding that Spice had already exercised his statutory right with Hon. Kirkendoll despite Spice

¹¹ The term “affidavit of prejudice” was used below at various times. It is generally not legally accurate any longer in the wake of amendments to RCW 4.12.040 and RCW 4.12.050 under SB 5277 (effective July 23, 2017) by removing the affidavit requirements and replacing with a “notice of disqualification.” By referencing there had been “no showing that hearing the matter ... would prejudice Mr. Spice’s ability to receive a fair trial, as required by RCW 4.12.050” Hon. Cuthbertson was also relying on the former version of RCW 4.12.050, as the then enacted version contains no such “fair trial” language.

never having filed an affidavit of prejudice nor referencing or invoking RCW 4.12.050 as pertains to Hon. Kirkendoll. See CP 1213-14 (order remanding).

Assuming *arguendo* that Hon. Cuthbertson has any standing to challenge Hon. Blinn's decision, there are only two avenue to challenge the legality conclusion of a superior court judge. CR 59 reconsideration or an appeal (generally to the Court of Appeals). Despite a diligent search no such authority has been located that could arguably imply Hon. Cutherbertson had authority to expressly overrule his co-equal judicial colleague.

A superior court has appellate jurisdiction, by Washington State Constitution, over inferior courts within their respective counties. Wash. Const. Article IV Sec. 6. However, "Superior court actions may be reviewed by the court of appeals or by the supreme court as provided by statute or by rule authorized by statute." Wash. Const. Article IV Sec. 30. Hon. Cutherbertson did not ask his colleague on the bench to reconsider the decision and, Hon. Cuthbertson neither took an appeal nor was he sitting in an appellate capacity to review the decision. There is simply no obvious grounds upon which Hon. Cutherbertson has authority to overturn the, correct, legal conclusion of Hon. Blinn.

Spice motioned Hon. Kirkendoll to recuse herself based on specified conflict of interest concerns and did so after she had made a discretionary ruling. See CP 810-13 (motion to recuse), 707-09 (discretionary ruling). Hon. Kirkendoll denied the request based on conflict of interest, but voluntarily recused herself. CP 987. Hon. Kirkendoll also denied a motion to vacate at the same time she recused herself. CP 987. If Spice were exercising his rights under RCW 4.12.050 he would have been required to do so prior to the discretionary rulings of Hon. Kirkendoll. Thus, even if Hon. Cuthbertson had the jurisdiction to overrule Hon. Blinn, the legal conclusion was itself, with all due respect, incorrect.

I. The Estate should not be permitted to transfer all of its assets to its heir.

On February 16, 2017, the Estate motioned to allow transfer of real property owned by the Estate (and co-owned by Spice) to its sole heir. CP 559, 595-96. The Estate asserts that the “goal is to have property transferred to ...the sole beneficiary” who has petitioned for bankruptcy protection to allow the bankruptcy trustee to sell the properties and “deal[] with” secured creditors. March 31, 2017 RP 6:17-24.

Spice objected and noted that the personal representative had made the same motion on January 28, 2014 (denied), February 13, 2014

(denied), and then simply deeded the properties at issue to herself until Spice successfully motioned the trial court to vacate the transfer. See CP 567, 575-83. The trial court was not previously willing to transfer the properties when Spice had an active claim against the Estate.

The trial court granted the Estate's motion to transfer the relevant properties but held that the proceeds from any sale of real property transferred is subject to RCW 11.76.110 and that the proceeds remain an asset of the Estate. CP 708. The trial court also restored non-intervention powers of the Estate with no finding of solvency. CP 708.¹²

The Estate's motion was predicated on the notion that "all creditor claims have been dismissed." CP 561; see also March 31, 2017 RP 6:5-10. Although arguably true at the time the motion was authored, that premise is no longer true. On December 12, 2017 this Court reversed a dismissal of a creditor claim of the Estate put forward by Spice. See Spice v. Estate of Doris Matthews, Court of Appeals Div. II No. 48458-7 (2017), Appendix A. This issue was brought on reconsideration and was denied by Hon. Ashcraft on October 24, 2017, thus authorizing non-intervention powers to Respondent Donna DuBois as well as the sale of all properties. CP 1683. This order requires review, as the effects are devastating to Spice.

¹² The non-intervention powers being restored were only as to the co-owned property. CP 563-64. Although the trial court should have made a finding of solvency, the failure to do so is of no obvious consequence considering the express directive to transfer the properties is the equivalent of court intervention. See RCW 11.68.011 (2).

J. The transfer of properties by individual respondents without court order constituted fraudulent misrepresentation and fraudulent transfer

Spice's Amended Complaint for fraudulent misrepresentation and fraudulent transfer require further review by this court. To establish fraudulent misrepresentation, Spice was required to prove nine elements: (1) representation of an existing fact, (2) the materiality of the representation, (3) the falsity of the representation, (4) the speaker's knowledge of the falsity of the representation or ignorance of its truth, (5) the speaker's intent that the listener rely on the false representation, (6) the listener's ignorance of its falsity, (7) the listener's reliance on the false representation, (8) the listener's right to rely on the representation, and (9) damage from reliance on the false representation. Baertschi v. Jordan, 68 Wn.2d 478, 482, 413 P.2d 657 (1966). Respondents intentional transfer of properties in violation of court order and regardless of Spice's ownership are a red flag in itself. CP 352-53. However, the Respondents not only repeatedly conveyed the properties at issue in this matter from the Estate to the Donna Dubois without notice to Spice and then asserted that the conveyances did not take place. Such action place Respondents DuBois in direct violation with multiple court orders. CP 352. In addition, a Broker's Opinion of Value was obtained with clearly inflated and incorrect

information with the goal of eliminating Spice's offer of purchase the properties to the Bankruptcy Court. The intentional and repeated actions by Respondents Dubois, subsequent false denials and the fact that Spice and the Court relied on these representations establish a basis for this cause of action and raises material issue of fact when viewed in light most favorable to Spice.

Additionally, the statute for fraudulent transfer is appropriate in this case and should not have been dismissed. CP 363-64. RCW 19.40.071 provides, "(a) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in RCW 19.40.08, may obtain" such results as avoidance of the transfer, attachment of the asset, an injunction, appointment of a receiver, levy execution on the asset transferred, or "any other relief the circumstances may require."¹³ Here the fraudulent transfers made by Respondents impaired Spice's ability to obtain financing for the properties and attempted to thwart Spice's rights to homestead exemptions and create insolvency for the

¹³ (1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim; (2) An attachment or other provisional remedy against the asset transferred... (3) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure (i) An injunction against further disposition by the debtor... (ii) Appointment of a receiver... (iii) Any other relief the circumstances may require. (b) If the creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution of the asset transferred or its proceeds. RCW 19.40.071.

Estate. CP 363-64 These issues require further review by the Superior Court, as the facts, at a minimum, demonstrate a material issue of fact.

K. The trial court erred in awarding attorney fees to the Estate.

While the trial court gets broad discretion in determining the reasonableness of the attorney's fees, those awarded in this matter indicate a manifest abuse of discretion. See *Ethridge v. Hwang*, 105 Wn. App 447, 460, 20 P.3d 958 (2001). RPC, Section 1.5(c) requires the examination of the time, novelty and difficulty of the questions involved in a case. Washington Courts have adopted the "Lodestar" approach in the calculation of attorney fees. This method requires that the "trial court must determine the number of hours reasonably expended in the litigation." *Bowers v. Transamerica Title Insurance*, 100 Wn.3d 581, 597, 675 P.2d 193 (1983); see also *Lindy Bros Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3rd Cir. 1973). The total numbers of hours reasonably expended is then multiplied by the reasonable hourly rate of compensation. See *Bowers*, 100 Wn.3d at 597.

Here, the basis of the award for attorney fees at the trial court was based on the dismissal of all claims at summary judgment under RCW 11.96.A.150. "Defendants are entitled to an award of reasonable attorneys fees and costs under RCW 11.96A.150 ..." CP 1691, 1654-55,

“Attorneys fees and costs are denied as to all parties on the motion for reconsideration by Mr. Spice.” CP 1654-55.

The attorney’s fees awarded is included in this appeal is based on RAP 2.4(g) stating, “Award of attorney fees. An appeal from a decision on the merits of a case brings up for review an award of attorney fees entered after the appellate court accepts review of the decision on the merits.” Here, the initial Notice of Appeal was filed November 27, 2017. The order for attorney’s fees was decided on December 1, 2017.

L. Spice should be awarded attorney fees on appeal under RCW 11.69A.150 and RAP 18.1.

RCW 11.96A.150 and RAP 18.1, allows for attorney fees “If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provide in this rule, unless a statute specifies that the request is to be directed to the trial court.” See RAP 18.1, RCW 11.96A.150.

Mr. Spice incurred significant attorney fees in the preparation of this appeal, and he respectfully requests an award of attorney fees for having to file and pursue this appeal. Pursuant to RAP 18.1, Spice asks this Court to award attorney’s fees and costs, as well as those incurred in the trial court. If this Court issues an opinion in favor of Spice, then,

pursuant to RAP 14.2, the Court should award him costs. Costs may be awarded to a party prevailing on appeal. *N.W. Television Club, Inc. v. Gross Seattle, Inc.*, 96 Wn.2d 973, 640, P.2d 710 (1981). Pursuant to the RCW 11.96A.150 and RAP 14.2, the Court should grant attorney fees and costs as well as remand for trial.

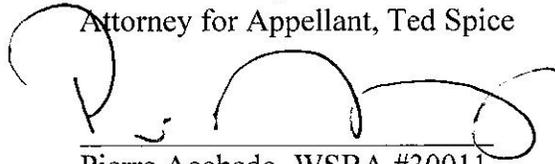
VI. CONCLUSION

The trial court erred in not finding genuine issues of material fact based on the allegations in the Amended Complaint. Additionally, the Motion for Reconsideration failed to account for conflict and severe ramifications to Spice based on prior conduct. The Affidavit of Prejudice, now called a Notice of Disqualification, was improperly overruled by one Superior Court Judge over another Judge with the same judicial standing before the Court. Thus this effectively placed a party before the same judge that they disqualified. Based on the above documentation establishing a clear right to the Court and improper designation of Spice as a vexatious litigant, this Court should remand the matter for trial and award Spice his attorney fees and costs pursuant to the RCW 11.96A.150, RAP 18.1, and RAP 14.2 on this appeal.

DATED this July 5, 2016

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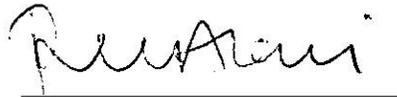
Jonathan Baner, WSBA #43612
Attorney for Appellant, Ted Spice



Pierre Acebedo, WSBA #30011
Attorney for Appellant, Ted Spice

CERTIFICATE OF SERVICE

I, Reem Alawi, a person over 18 years of age, served: Court of Appeals division II and to **Mr. Patrick Hanis** a true and correct copy of the document to which this certification is affixed, Appellant's Brief via first class mail postage pre-paid. Mr. Hanis was also served via e-mail. I declare under penalty of perjury under the laws of the State of Washington that the forgoing is a true and correct statement. Signed at Puyallup, WA on 7/5/18.



Reem Alawi

APPENDIX “A”

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TED SPICE,

Appellant,

v.

ESTATE OF DORIS MATHEWS,

Respondent.

No. 48458-7-II

UNPUBLISHED OPINION

BJORGEN, C.J. — In 2004 Ted Spice and Doris Mathews formed a real estate development company, Plexus Investments LLC, and Mathews quitclaimed several parcels of property to the LLC and Spice. After Mathews' death in 2009, Spice filed two creditor's claims against the Estate of Doris Mathews (Estate), one of which ripened into a lawsuit by Spice which the trial court decided in the Estate's favor on summary judgment.

Spice appeals, arguing that the trial court erred by granting the Estate summary judgment dismissing his claims for (1) contribution for property taxes paid on co-owned property and (2) breach of fiduciary duty arising from the Estate's (a) misappropriation of funds, (b) failure to contribute to the LLC, and (c) waste. He also argues that the trial court erred by denying his motions for a continuance and for reconsideration and by awarding attorney fees to the Estate. Both Spice and the Estate request attorney fees on appeal.

We hold that Spice's appeal is timely and that the record on summary judgment shows no genuine dispute of material fact as to Spice's claims for (1) contribution for paid property taxes, (2) misappropriation of funds, and (3) failure to contribute to the LLC, but that a genuine issue of material fact exists as to (4) whether the Estate breached its quasi-fiduciary duty to Spice by

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allowing waste to occur at co-owned properties. We also hold that the trial court did not err by denying Spice's motions for a continuance and for reconsideration. Consequently, we reverse the grant of summary judgment on the issue of breach of fiduciary duty by allowing waste, and we reverse the trial court's award of attorney fees to the Estate. We affirm the remainder of the trial court's summary judgment order and remand for additional proceedings. Finally, we decline to award attorney fees on appeal to either party

FACTS

Mathews died on December 8, 2009. Prior to her death, Mathews and Spice created Plexus Investments LLC (LLC), a real estate development company, and were its only members, with Spice holding a 51 percent interest and Mathews holding a 49 percent interest.

On January 8, 2010, Donna E. DuBois was appointed as personal representative of Mathews' estate. On April 26, Spice filed a creditor's claim against the Estate for \$8,000,000 based on a promissory note executed between himself and Mathews. The Estate rejected Spice's creditor's claim on July 7, and on August 2 Spice filed a lawsuit against the Estate to enforce the promissory note and creditor's claim under a breach of contract theory.

On July 28, 2011, Spice filed his first amended complaint, alleging that the Estate was liable for breach of contract, conversion, tortious interference with a business expectancy, breach of fiduciary duty, and frivolous litigation. The dispute proceeded to trial and, on September 17, 2012, the jury apportioned ownership interest in several disputed properties that were the subject of the litigation between Spice and the Estate. For the parcels relevant to this appeal and discussed in this opinion, Spice was awarded a 25 percent interest and the Estate a 75 percent interest, except for the parcel located at 11305 58th Street Court East, which was awarded

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wholly to the Estate.¹ On appeal, we affirmed the trial court, holding that neither party was substantially prevailing for purposes of attorney fees and that Spice did not preserve his remaining claims on appeal. *Spice v. DuBois*, 192 Wn. App. 1054, 4, 6-7 (2016) (unpublished).

On December 21, 2012, the trial court granted Spice's motion for an order appointing a property manager for the parcels at 11305 58th Street Court East, 11003 58th Street Court East, number 1, 2, and 3 triplexes, 11004 58th Street Court East, 11007 58th Street Court East, 11011 58th Street Court East, and three trailers identified as 11010A, 11010B, and 11010C. The court ordered the Estate to hire a property management company on or before January 1, 2013 and that the cost of the property management "shall be split 75 [percent]—25 [percent] pursuant to ownership until further order of the court." Clerk's Papers (CP) at 67. Then, on March 29, 2013 the trial court issued an order restraining Spice from involvement in any property management duties for any of the properties that were subject to the court's December 21, 2012 order. The trial court noted in its March 29, 2013 order that the properties were then being managed by SJC Management Group.

On April 16, 2013, Spice filed another creditor's claim against the Estate seeking \$2,000,000 based on work he did managing and developing property for Mathews between 2003 and 2012. Spice also asserted claims on behalf of several other individuals who had assigned their claims to Spice, which totaled \$337,000. The Estate rejected all of Spice's claims.

¹ The record suggests that Spice subsequently gained a 33 percent interest in this property. This, however, plays no role in the analysis of the present appeal.

On June 5, 2013 Spice and another claimant, Jeffrey Payne, each filed a lawsuit to pursue their claims against the Estate. Spice's lawsuit sought damages based upon alleged oral contracts between Spice and Mathews.

At some point during 2013 or 2014, a pipe burst in one of the three triplex units at 11003 58th Street Court East. Spice amended his complaint on December 16, 2014 to add the following claims: (1) contribution for property taxes paid on co-owned property, (2) breach of fiduciary duty by the Estate for failing to make contributions to the LLC so that the LLC could pay off debts to Spice, (3) breach of fiduciary duty by misappropriating funds from co-owned properties, and (4) breach of fiduciary duty by committing waste with regard to co-owned properties.² On April 6, 2015, the trial court issued an order consolidating Spice's and Payne's cases.

On September 17, 2015, the Estate filed a motion for summary judgment requesting dismissal of all of Spice's and Payne's claims. In her declaration, DuBois stated that SJC had managed the 11003 property from January 1, 2013 until March 31, 2014 and that she only discovered the water damage on April 3, 2014, after inspecting the property. Spice opposed the motion and requested a continuance in order to conduct further discovery. The trial court denied the continuance.

At the summary judgment hearing, Spice offered the following evidence: (1) an e-mail regarding Spice's attorney nonsuiting two lawsuits in 2014, (2) an e-mail between SJC and Spice, (3) a loan default notice from Bank of America, (4) Elite Tax and Financial Services'

² Spice's amended complaint also included a claim for waste independent of the waste claim associated with the alleged breach of fiduciary duty. On appeal, Spice argues only that the Estate breached its fiduciary duty by committing waste.

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accounting notes, (5) Spice's work history regarding work performed for Mathews, and (6) Payne's work history regarding work performed for Mathews.

On October 30, 2015 the superior court granted summary judgment in the Estate's favor and entered mixed findings of fact and conclusions of law. Although findings on summary judgment are superfluous and not proper, *Hemenway v. Miller*, 116 Wn.2d 725, 731, 807 P.2d 863 (1991), some of those entered reflect the court's legal reasoning and are set out as follows:

2. Spice has sought wages based on an oral contract he allegedly entered into with the deceased Doris Mathews. This claim is barred by either the three year statute of limitations regarding oral contracts and by the time limits contained in RCW 11.40.051, the largest of such time limit being two years from date of publication of a notice to creditors. This claim is dismissed.
3. Spice, as assignee of others, has also sought wages based upon an oral contract the others allegedly entered into with the deceased Doris Mathews. For the same reasons as identified in the preceding paragraph these claims are untimely. These claims are dismissed.
4. Spice claims contributions owed by the deceased Doris Mathews for her respective ownership in Plexus Investments LLC. Her membership terminated upon her death, and the Estate does not have any duty to contribute to that entity because their predecessor, Ms. Mathews, is no longer a member of it. This claim is dismissed.
5. Spice claims that the Estate has committed waste upon real property that the Estate and Spice jointly own. There is no evidence that the [E]state was involved in the management when that occurred. This claim is dismissed.
6. Spice claims that the [E]state has breached their fiduciary duty to Spice. No such duty is owed. This claim is dismissed.
7. Spice claims that the Estate has misappropriated funds that he is entitled to. There is no evidence presented that any misappropriation has occurred. This claim is dismissed.
8. Spice's motion for a continuance is denied.

CP at 338-39.

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On November 9, the final day allowed, Spice filed a motion to reconsider the October 30 order granting summary judgment in the Estate's favor. Under Pierce County Superior Court's local rules (PCLR) 0.2(a)(2)(A), "[s]uperior [c]ourt's regular hours are 8:30 am to 4:30 pm." Pursuant to Washington state court rules, General Rule (GR) 30(c)(1), "[a]n electronic document is filed when it is received by the clerk's designated computer during the clerk's business hours; otherwise the document is considered filed at the beginning of the next business day." Spice's motion to reconsider was marked as filed on November 9, 2015 at 4:29 p.m. However, the supporting documents were submitted slightly after 4:30 p.m. on November 9. Consequently, the supporting documents were deemed to be filed on November 10 under GR 30(c)(1). The motion for reconsideration contained roughly 250 pages of supporting material, much of it filed for the first time with the motion.

On November 25 Spice filed a motion to supplement the record on reconsideration with the untimely supporting documentation associated with the November 9 motion for reconsideration and a declaration by Norma Woods of Elite Tax and Financial Services, an accountant hired by Spice. On December 21 the trial court denied Spice's motion for reconsideration and motion to supplement the record on reconsideration. In making its ruling, the trial court considered "documents filed with respect to the [m]otion for [s]ummary [j]udgment," but did not appear to consider any of the supporting documentation filed with respect to the motion for reconsideration. CP at 791.

After the trial court denied reconsideration, both parties filed motions for attorney fees under RCW 11.96A.150. The trial court awarded the Estate \$30,000 in attorney fees and denied Spice's motion. The trial court reasoned that the Estate was entitled to attorney fees due to the

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litigious actions of Spice and for having to expend resources to defend against Spice's claims, but the court offset part of the award to reflect that Spice prevailed on some motions.

Spice appeals the summary judgment ruling, the denial of reconsideration, and the award of attorney fees and costs in the Estate's favor.

ANALYSIS

I. STANDARDS FOR REVIEW OF SUMMARY JUDGMENT

We review a grant of summary judgment *de novo*, considering all the evidence and reasonable inferences from the evidence in the light most favorable to the nonmoving party. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Summary judgment is only appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.* A material fact is a fact that affects the outcome of the litigation. *Id.* at n.8.

II. TIMELINESS OF APPEAL

As a threshold matter, the Estate argues that Spice's appeal was untimely. Specifically, it argues that the 30-day period to file the appeal commenced when the summary judgment order was filed on October 30, 2015, not when the order denying reconsideration was filed on December 21. The Estate rests this argument on its claim that the reconsideration motion itself was not timely. We disagree.

CR 59(b) requires a party to submit a motion for reconsideration "not later than 10 days after the entry of the judgment, order, or other decision." Under RAP 5.2(e), if a party files a timely motion for reconsideration, a party may file an appeal within 30 days after entry of the

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order on reconsideration. *Schaefco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn.2d 366, 367-68, 849 P.2d 1225 (1993).

Although some of the supporting documents for the motion for reconsideration were marked as filed on November 10, 2015, the motion for reconsideration itself was marked as filed on November 9, 2015, within the 10-day limit set by CR 59(b). The Estate points out that the note for the motion docket was not marked as filed until November 10, but we have previously held that “[f]ailure to note the motion at the time it is served and filed does not affect the extension of time for appeal under RAP 5.2(e).” *Singleton v. Naegeli Reporting Corp.*, 142 Wn. App. 598, 603, 175 P.3d 594 (2008) (quoting *Buckner, Inc. v. Berkey Irrig. Supply*, 89 Wn. App. 906, 916, 951 P.2d 338 (1998)). Thus, the reconsideration motion was timely filed.

The trial court denied the motion for reconsideration on December 21, 2015. Spice filed his appeal on January 14, 2016, less than 30 days after the trial court denied his motion for reconsideration. Therefore, Spice’s appeal is timely under RAP 5.2(e).

III. SPICE’S MOTION TO SUPPLEMENT THE RECORD ON RECONSIDERATION AND ARGUMENT TO EXTEND *KECK V. COLLINS* TO RECONSIDERATION MOTIONS

Spice argues that we should extend the holding of *Keck v. Collins* to require a trial court to conduct a *Burnet* analysis on the record before excluding untimely evidence submitted in the context of a motion for reconsideration. Br. of Appellant at 47-50 (citing *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997)). We address this aspect of reconsideration first, because it affects the scope of the record on which summary judgment is reviewed.

In *Burnet*, our Supreme Court set forth the requirements that must be met before a trial court can impose the sanction of excluding evidence for a discovery violation. *Id.* at 494. In *Keck*, the court extended the rule in *Burnet* to the exclusion of untimely filed evidence in the

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context of a summary judgment motion. 184 Wn.2d at 368-69. The trial court excluded an untimely affidavit offered by the plaintiffs and denied a motion for a continuance to permit filing. *Id.* at 366.

We decline Spice's invitation to extend the holding of *Keck* to the exclusion of untimely evidence submitted as part of a motion for reconsideration. Although our Supreme Court has noted that the purpose of summary judgment is to determine whether a party can ultimately produce competent evidence at trial, in this case the trial court had already granted summary judgment before Spice attempted to supplement the record. *Keck*, 184 Wn.2d at 369. The trial court's grant of summary judgment was a final judgment under the circumstances of this case because it adjudicated all of the claims raised by Spice in his complaint, was in writing, signed by the judge, and filed. *Rose ex rel. Estate of Rose v. Fritz*, 104 Wn. App. 116, 120, 15 P.3d 1062 (2001). Once a judgment is final, a court "may reopen it only if authorized by statute or court rule," in this case, CR 59, which governs motions for reconsideration. *Rose*, 104 Wn. App. at 120. Therefore, because Spice's untimely filed material was not excluded as a discovery sanction and Spice's motion for reconsideration sought to alter a final judgment, we hold that the trial court's analysis is governed by CR 59. As such, the trial court was not required to perform a *Burnet* analysis before excluding Spice's untimely material submitted on reconsideration. Instead, we review the exclusion of that material for compliance with CR 59.

We review a trial court's denial of a motion for reconsideration under CR 59 and its decision to consider new or additional evidence presented with the motion for an abuse of discretion. *Martini v. Post*, 178 Wn. App. 153, 161, 313 P.3d 473 (2013). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *In re*

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Marriage of Fiorito, 112 Wn. App. 657, 664, 50 P.3d 298 (2002). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. *Id.* A court's decision is based on untenable grounds if the factual findings are unsupported by the record. *Id.*

Under CR 59(a)(4), a party may seek reconsideration based on “[n]ewly discovered evidence . . . which the party could not with reasonable diligence have discovered and produced at the trial.” Spice does not suggest any reason why he was not able to submit his untimely evidence prior to the trial court's summary judgment ruling or even at the same time as his timely motion for reconsideration. Additionally, Spice's attorney conceded at oral argument that the untimely evidence was not newly discovered under CR 59(a)(4). Wash. Court of Appeals, *Estate of Doris Mathews*, No. 48458-7-II, oral argument (Apr. 18, 2017), at 2 min., 25 seconds (on file with the court). Therefore, the trial court did not abuse its discretion by denying Spice's motion to supplement the record on reconsideration.

IV. CLAIMS ON SUMMARY JUDGMENT

A. Oral Contracts

In his briefing, Spice states that he “has not appealed the trial court's ruling regarding claims against [Doris Mathews] that occurred during her lifetime.” Br. of Appellant at 24. Furthermore, at oral argument, Spice's attorney stated that Spice's claims for wages arising from the alleged oral contracts with Mathews was not being pursued on appeal. Wash. Court of Appeals, *Estate of Doris Mathews*, No. 48458-7-II, oral argument (Apr. 18, 2017), at 45 seconds (on file with the court). Therefore, we do not address the trial court's dismissal of Spice's oral contract claims.

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B. Property Taxes, Contribution to the LLC, Misappropriation of Funds

Because we uphold the trial court's denial of Spice's motion to supplement the record, the record on review of the trial court's grant of summary judgment consists of the record that was before the trial court when it granted summary judgment. Specifically, our record consists of: (1) an e-mail regarding Spice's attorney nonsuiting two lawsuits in 2014, (2) an e-mail between SJC and Spice, (3) a loan default notice from Bank of America, (4) Elite Tax and Financial Services' accounting notes, (5) Spice's work history regarding work performed for Mathews, and (6) Payne's work history regarding work performed for Mathews. Therefore, we consider these materials to determine whether any raise a genuine issue of material fact with regard to Spice's remaining claims on appeal and whether the Estate was entitled to judgment on them as a matter of law. CR 56.

The record shows that Spice has not demonstrated issues of material fact as to his claims for contribution for property taxes paid on co-owned properties or for breach of fiduciary duty regarding the misappropriation of funds or contribution to the LLC. In connection with his claim for contribution for property taxes, Spice alleges that he has acquired a lien on certain property because he has paid the property taxes. However, there is nothing in the record showing that he has complied with the statutory requirements for acquiring such a lien under former RCW 84.64.060 (2003). Furthermore, nothing in the record suggests that the Estate was a member of the LLC or otherwise had any duty to contribute to the LLC. Finally, although the record on summary judgment contains accountant's notes prepared for Spice, the record contains neither an attestation to the accuracy of those notes nor the supporting documents upon which those notes relied. Absent such an attestation or other means of verification, the accountant's notes do not

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create a genuine issue of material fact as to misappropriation of funds. Therefore, we affirm the trial court's dismissal on summary judgment of Spice's claims for contribution for property taxes paid and for breach of fiduciary duty regarding misappropriation of funds and contribution to the LLC.³

C. Waste

Spice argues that the trial court erred by dismissing his claims for waste against the Estate because he and the Estate were in a fiduciary relationship with respect to the management of the co-owned properties. We agree.

“Waste, as understood in the law of real property and as variously defined by [our Supreme Court] is an unreasonable or improper use, abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession which results in its substantial injury.”

Graffell v. Honeysuckle, 30 Wn.2d 390, 398, 191 P.2d 858 (1948) (internal quotations marks omitted). Under RCW 64.12.020, tenants in common may be liable to each other for waste.⁴

In a fiduciary relationship, one party “occupies such a relation to the other party as to justify the latter in expecting that his interests will be cared for.” *Kitsap Bank v. Denley*, 177

³ Although Spice raises an argument regarding a living trust associated with Mathews as part of his contribution argument, there is nothing in the record on appeal that pertains to the Mathews' living trust. Because we hold that Spice has not demonstrated an issue of material fact as to contribution to the LLC, we do not separately consider Spice's claims regarding the trust. Further, Spice argues that the trial court's grant of summary judgment on the contribution claim improperly binds the LLC to rulings from a proceeding to which it was not a party. We decline to speculate about the legal rights of the LLC in the absence of the LLC as a party in the present appeal.

⁴ “If a . . . tenant . . . in common . . . of real property commit[s] waste thereon, any person injured thereby may maintain an action at law for damages therefor against such . . . tenant.” RCW 64.12.020.

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Wn. App. 559, 574, 312 P.3d 711 (2013) (quoting *Liebergesell v. Evans*, 93 Wn.2d 881, 889-90, 613 P.2d 1170 (1980)). Fiduciary relationships “include those historically regarded as fiduciary,” *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 741, 935 P.2d 628 (1997), and may arise as a matter of law, such as in the relationship between attorney and client, doctor and patient, or trustee and beneficiary. *Kitsap Bank*, 177 Wn. App. at 574. However, a court may also determine that two parties are in a “quasi-fiduciary” relationship depending on the particular facts of a case. *Annechino v. Worthy*, 175 Wn.2d 630, 636, 290 P.3d 126 (2012). Various factors such as friendship between the parties, lack of expertise or knowledge on the part of one of the parties, the posturing of one of the parties as an advisor, or a party’s knowledge of the other party’s reliance on the first party’s actions may lead a court to conclude that a quasi-fiduciary relationship exists. *Liebergesell*, 93 Wn.2d at 890-91, 894-95. These include circumstances involving a “person whose relation with another is such that the latter justifiably expects his welfare to be cared for by the former.” *Goodyear*, 86 Wn. App. at 741 (quoting *Liebergesell*, 93 Wn.2d at 890-91).

On December 21, 2012, the trial court granted Spice’s motion for an order appointing a property manager to manage the disputed properties. Although Spice made the motion for the court to appoint a property manager, the court ordered that “[t]he personal representative [of the Estate] shall make best efforts to hire a property management company on or before January 1, 2013. Management fees shall be split 75 [percent]-25 [percent] pursuant to ownership until further order of the court.” CP at 71. Then, on March 29, 2013, the trial court enjoined Spice from being involved in any of the property management duties on any of the properties that were co-owned by Spice and the Estate that were involved in the litigation. The trial court’s orders

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gave the Estate responsibility for selecting a property manager and precluded Spice from being involved in managing the co-owned properties, leaving Spice entirely reliant on the Estate's supervision of the properties. Accordingly, under the case law above we hold that the Estate and Spice were in a quasi-fiduciary relationship with regard to the avoidance of waste in the management of the co-owned properties.⁵

Although we hold that the Estate and Spice were in a quasi-fiduciary relationship after Spice was barred from the property, the record is insufficient to determine as a matter of law whether the Estate in fact breached its quasi-fiduciary duty to Spice. Considering the facts in the light most favorable to Spice as the nonmoving party for summary judgment in the trial court, there are genuine issues of material fact that preclude dismissal of Spice's waste claim. Therefore, we reverse the trial court's summary judgment dismissing Spice's claim for waste arising from the Estate's breach of a quasi-fiduciary duty and remand for further proceedings.⁶

V. MOTION FOR RECONSIDERATION

Spice argues that the trial court erred by denying his motion for reconsideration. We decided above that the trial correctly denied Spice's motion to supplement the record on reconsideration. We now uphold the trial court's denial of his motion for reconsideration itself.

⁵ Because we determine that a quasi-fiduciary relationship arose between Spice and the Estate regarding the co-owned property as a consequence of the various court orders, we do not reach the question of whether co-tenants are necessarily in a fiduciary relationship or otherwise owe each other fiduciary duties as a matter of law.

⁶ Spice's brief also alleges that the Estate had a duty to maintain the rental properties under RCW 11.48.020, which requires a personal representative to keep real property in tenantable repair until the estate is settled or delivered to the proper heirs or devisees. Spice did not raise this theory before the trial court, and we generally do not review claims that are raised for the first time on appeal. RAP 2.5(a); *Wilcox v. Basehore*, 187 Wn.2d 772, 788, 389 P.3d 531 (2017). Therefore, we decline to address Spice's claim for waste under this theory.

We review a trial court's denial of a motion for reconsideration for an abuse of discretion. *Martini*, 178 Wn. App. at 161. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *In re Fiorito*, 112 Wn. App. at 664. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. *Id.* A court's decision is based on untenable grounds if the factual findings are unsupported by the record. *Id.*

Under CR 59(a)(4), a party may seek reconsideration based on “[n]ewly discovered evidence . . . which the party could not with reasonable diligence have discovered and produced at the trial.” We held above that the untimely evidence Spice attempted to submit in support of reconsideration was not newly discovered under CR 59(a)(4). Therefore, the trial court did not abuse its discretion by declining to grant reconsideration on this ground.

At oral argument, Spice's attorney argued that the trial court should have granted reconsideration because substantial justice had not been done. Wash. Court of Appeals, *Estate of Doris Mathews*, No. 48458-7-II, *oral argument* (Apr. 18, 2017), at 2 min., 50 seconds (on file with the court). Under CR 59(a)(9), the trial court may grant reconsideration on the ground that “substantial justice has not been done.” However, reconsideration on that ground is rarely applied individually given the alternative broad grounds for reconsideration under CR 59. *Lian v. Stalick*, 106 Wn. App. 811, 825, 25 P.3d 467 (2001). Further, any claimed injustice arising from the trial court's refusal to consider the untimely evidence is primarily attributable to Spice's failure to timely submit evidence that he already possessed. Based upon the record before us, the trial court did not abuse its discretion by declining to grant reconsideration on the grounds that substantial justice had not been done.

VI. MOTION FOR CONTINUANCE

Spice also contends that the trial court improperly denied his motion to continue the motion for summary judgment. We disagree.

As part of his reply to the Estate's motion for summary judgment, Spice stated in support of his motion for a continuance:

[F]urther information . . . must be obtained through a deposition of Jason Clifford [SJC property manager] and, most likely, Donna and Mark DuBois. There is both a factual dispute regarding [the waste claim] of Spice as well as good grounds to continue to allow additional discovery.

CP at 274 (footnote omitted).

We review a denial of a motion for continuance for an abuse of discretion. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007). Our Supreme Court has held that a trial court may deny a motion for continuance when:

“(1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact.”

Qwest, 161 Wn.2d at 369 (quoting *Butler v. Joy*, 116 Wn. App. 291, 299, 65 P.3d 671 (2003)).

Spice contends on appeal that the trial court erred in denying his motion for a continuance because the one month between the filing of the summary judgment motion and its hearing did not afford the time needed to conduct additional investigation. In his reply to the Estate's motion for summary judgment, Spice requested a continuance in order to depose the SJC property manager and Dubois and her husband, but did not offer a reason for his delay, despite his protracted and ongoing litigation with the Estate. Therefore, because Spice did not

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have a good reason for his delay in obtaining the evidence, the trial court did not abuse its discretion by denying Spice's motion for a continuance.

VII. ATTORNEY FEES

A. Attorney Fees at Trial

Spice argues that the trial court improperly awarded attorney fees to the Estate. Given our reversal of the summary judgment on the waste claim, we agree.

The trial court awarded the Estate \$30,000 in attorney fees under RCW 11.96A.150.

That statute provides:

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

RCW 11.96A.150.

The trial court based its award on the fact that all of Spice's claims were dismissed on summary judgment, but it also reduced attorney fees to account for the fact that Spice had prevailed on some of his motions. We review an award of attorney fees under this statute for an abuse of discretion. *In re Estate of Mower*, 193 Wn. App. 706, 727, 374 P.3d 180, review denied, 186 Wn.2d 1031 (2016).

Our decision reverses the grant of summary judgment in the Estate's favor on the issue of waste, one of Spice's main claims. With that, the trial court's basis for its award, that all of

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Spice's claims were dismissed on summary judgment, is removed. Therefore, the award must be reversed.

B. Attorney Fees on Appeal

1. Spice

For the first time in his reply brief, Spice argues that we should award him attorney fees on appeal under RCW 11.96A.150. Under RAP 18.1(b), a party seeking attorney fees "must devote a section of its opening brief to the request for the fees or expenses." Because Spice did not request fees in his opening brief, he is not entitled to an award of attorney fees on appeal.

2. Estate

The Estate also requests attorney fees on appeal under RCW 11.96A.150, which gives an appellate court broad discretion to consider any factors that it deems relevant to determining an equitable award and amount and is not conditioned upon a party substantially prevailing in litigation. Because this appeal involved a number of complex issues and we reverse summary judgment on the issue of waste, we decline to award the Estate attorney fees on appeal.

CONCLUSION

We reverse the grant of summary judgment on the issue of breach of fiduciary duty by allowing waste, and we reverse the award of attorney fees to the Estate. We affirm the remainder of the trial court's summary judgment order and remand for additional proceedings. We decline to award attorney fees on this appeal.

A majority of the panel having determined that this opinion will not be printed in the

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Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040,
it is so ordered.

Bjorge, C.J.
BJORGE, C.J.

We concur:

Worswick J
WORSWICK, J.

J. Lee
LEE, J.

ACEBEDO AND JOHNSON

July 05, 2018 - 12:59 PM

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