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WASHINGTON STATE COURT OF APPEALS  
DIVISION TWO

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DEBORAH DUNN,

Appellant,

v.

BREMERTON PILOTS ASSOCIATION,

Respondent.

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BRIEF OF RESPONDENT BREMERTON PILOTS ASSOCIATION

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## **I. INTRODUCTION**

Appellant Dunn sued Bremerton Pilots Association (“BPA”) to recover money that she distributed to BPA when she was serving as Personal Representative of the Estate of Yukiko Howell. Dunn sued in her capacity as assignee of the Estate, which was the entity that actually possessed a claim against BPA. But Dunn waited too long to file suit, and the statute of limitations on her claims had expired by the time she filed her Complaint. And, long before to that, the Estate – via the new PR that replaced Dunn – failed to notify BPA of the overpayment until 15 months after the overpayment was determined by the probate court, and by then BPA had distributed all of those funds to young people getting started with their flight training towards becoming professional pilots.

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

A. Did the Estate’s claims against BPA accrue on December 19, 2013, when Commissioner Velategui ruled that “10% means 10% total”, removed Dunn as PR, charged the new PR with recovering the excess funds from the charities, and ruled that Dunn would be liable for the overpayment if the excess funds could not be recovered?

B. Does the statute of limitations bar Dunn’s claims?

C. Does Dunn’s unjust enrichment claim fail, where the gift to BPA was voluntary, BPA itself neither received nor retained any benefit

from same, and it would be inequitable to require BPA to now raise more funds to pay Dunn back?

D. Does Dunn's conversion claim fail, where the funds were given to BPA free and clear, and the Estate thus did not retain any property interest in them?

E. Is Dunn estopped from seeking recovery of the funds from BPA, where the Estate failed to notify BPA of the excess distribution until after BPA had already disbursed all the money to scholarship recipients?

F. Should BPA be awarded attorney fees for Dunn's frivolous appeal?

### **III. STATEMENT OF THE CASE**

In brief, the record before the trial court established the following facts. Yukiko "Yuki" Howell was a member of Bremerton Pilots Association, a nonprofit group whose major activity is raising funds to support young people who are training to become pilots. BPA raises funds from volunteer donations, proceeds from occasional special events, and scholarship-specific fund raising auctions. Ms. Howell was very supportive of this mission. **CP 95-96**

A. February-June 2013: Howell passes away, probate proceedings begin, and TEDRA petition filed.

Howell passed away in February 2013, and her 2010 will and

related documents were admitted to probate in King County. Initially, the court appointed Timothy Alentiev as Personal Representative (“PR”), but a dispute soon arose with respect to a codicil and “amendment” to the 2010 will.

The “amendment” was executed in 2012 by Howell, and changed the distribution scheme of the will as regards the amount bequeathed to Howell’s children and grandchildren. The 2013 codicil was executed on the day of Howell’s death by appellant Deborah Dunn under a power of attorney, and changed the executor from Dunn to Alentiev.

A dispute soon arose among Howell’s family regarding the 2012 and 2013 documents, and a TEDRA petition was filed in June 2013 by Howell’s son and daughter. **CP 100-101**

B. September-October 2013: Dunn is appointed PR, distributes funds to BPA.

On September 23, 2013, the court entered an order confirming admission of Howell’s 2010 will, and invalidating the 2012 “amendment” and 2013 “codicil.” The court also removed Alentiev as PR and appointed Dunn to that position. **CP 53-58**

In early October 2013, Dunn distributed funds from the Estate to five charitable beneficiaries, one of which was BPA. A check for \$15,000 was delivered to BPA, which deposited the funds in its bank account.

**CP 96-97, 102** BPA emailed the Estate acknowledging receipt and explaining that the funds would be used to fund the youth aviation scholarships. **CP 103**

- C. October-December 2013: Other beneficiaries object to distributions, file motions with the probate court, and Commissioner Velategui removes Dunn as PR, rules that BPA was overpaid, and rules that Dunn will be liable to Estate for excess payments if Estate cannot recover same.

Dunn then notified the other beneficiaries of these distributions, and that led to an objection from other beneficiaries as to the amount of funds distributed. In brief, Dunn read the will as distributing 10% of the Estate to *each* of the five charities, whereas the other beneficiaries claimed this mean 10% total to be divided among the five charities (i.e., 2% each). There were also objections as to the early distribution, lack of proper accounting, etc.

Motions were filed and then heard by Commissioner Carlos Velategui on December 19, 2013. In his ruling, the Commissioner stated:

And I don't like what I've seen here. And there's a –there's a – there's a Probate Guardian ad Litem in this case, and she had an absolute duty and a fiduciary duty. And if she has distributed 10% to each of the charitable organizations as opposed to 10% for all of them, she's going to end up paying it back from them.

**CP 73-74.** The court's Order removed Dunn as PR (but did not discharge her), appointed Karen Darrin as PR, required Dunn to file a full accounting in 30 days, and further provided, "If Ms. Darrin is unable to

recover the excess \$50,000 Ms. Dunn paid to the charities, or any other improper distributions, Ms. Dunn will personally pay that sum to the estate.” **CP 84-85**

Throughout all this, nobody ever notified BPA of the dispute, the other beneficiaries’ objections, the motions and hearing, or the court’s Order. **CP 97**

D. December 2013 – March 2015: Estate fails to notify BPA of the excess distribution or the court’s order, and BPA disburses all the funds to scholarship recipients.

Despite the court’s ruling, neither the Estate (via the new PR) nor Dunn ever notified BPA of these proceedings, until the new PR sent a letter to BPA in March 2015 (15 months later), explaining what had happened and asking for the excess distribution to be returned. By that time, BPA had already disbursed all of the funds from the Estate to various scholarship recipients, in the normal course of its charitable activities. BPA wrote back to the Estate explaining these facts. **CP 110**

E. August-September 2015: Judgment against Dunn for excess distributions, Dunn satisfies same, and takes assignment of claims from Estate.

The Estate then left the issue dormant, until August 2015 when the court entered judgment against Dunn for the amount of the excess distributions. **CP 86-90** Dunn paid the judgment to the Estate, and in September 2015 obtained a satisfaction of judgment from the Estate

(CP 91-92), along with an assignment of whatever claims the Estate might have against the charitable beneficiaries. CP 93-94

F. November 2017 – March 2018: Dunn files suit against BPA, and superior court grants summary judgment to BPA.

Dunn eventually filed suit in Kitsap County Superior Court in November 2017, asserting claims for (1) conversion and (2) unjust enrichment. CP 3-6 Dunn's Complaint made clear that she was suing as assignee of the Estate. CP 3

BPA answered Dunn's Complaint, and asserted various affirmative defenses, including statute of limitations, estoppel, and laches. BPA then brought a Motion for Summary Judgment based on (1) the statute of limitations, (2) failure of the conversion claim on the merits, and (3) estoppel, based on the Estate having remained silent for 15 months while knowing that BPA and other charities were expending the funds on their respective missions. CP 22-35 Dunn filed a cross-motion for summary judgment. Though Dunn claims that BPA did not object to the application of an unjust enrichment theory, and/or conceded that such theory would apply (*App. Brief at 10*), that is incorrect. BPA set forth in its opposition brief why the unjust enrichment claim, even if a theory applicable in Washington, failed on the merits. CP 240-243.

On March 9, 2018, the trial court, Hon. Leila Mills, heard

argument and granted BPA's motion and denied Dunn's motion. **CP 253-254** The trial court stated that dismissal was based on the statute of limitations. **VRP 29-30**

#### **IV. STANDARD OF REVIEW**

A CR 56 summary judgment dismissal by the trial court is reviewed *de novo* by the appellate court. *Mohr v. Grantham*, 172 Wn.2d 844, 859, 262 P.3d 490 (2011). The appellate court also reviews *de novo* any evidentiary rulings by the trial court in conjunction with the CR 56 motion. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). An order granting summary judgment may be affirmed on any legal basis supported by the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027, *cert. denied*, 493 US 814 (1989); *Hadley v. Cowan*, 60 Wn. App. 433, 444, 804 P.2d 1271 (1991).

The purpose of summary judgment is to secure the just, speedy and inexpensive determination of lawsuits by avoiding a useless trial where no material facts are at issue. *Maybury v. City of Seattle*, 53 Wn.2d 716, 336 P.2d 878 (1959). The trial court pierces the formal allegations made in the parties' pleadings and grants relief by summary judgment where it appears from uncontroverted facts set forth in affidavits, declarations, depositions or admissions on file, that there are, as a matter of law, no genuine issues to be litigated. *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960);

CR 56(c). The party moving for summary judgment has the initial burden of proving that there is no genuine issue as to any material fact. *Id.* But, where the motion for summary judgment is supported by evidentiary matter, the adverse party may not rest on mere allegations in the pleadings; it must set forth specific facts showing that there is a genuine issue for trial. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989); *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975).

Once there has been a showing by the party bringing a summary judgment motion that there are no material facts for a jury to decide, the party opposing such a motion must respond with more than conclusory allegations, speculation, or argumentative assertions of the existence of unresolved factual issues. *Michelsen v. Boeing Co.*, 63 Wn. App. 917, 920, 826 P.2d 214 (1991); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988).

Here, the trial court correctly found that there were no issues of material fact, and that the statute of limitation on Dunn's claims expired long before she filed suit. In addition, the unrebutted evidence before the trial court demonstrated that Dunn's conversion claim and unjust enrichment claim failed as a matter of law. Finally, the record established that even if Dunn had timely brought a cognizable claim, BPA had disbursed all the excess funds on student scholarships before the Estate

ever notified BPA of the issue, and thus BPA was entitled to summary judgment on the grounds of equitable estoppel.

## V. ARGUMENT

The law is clear that the assignee (Dunn) takes the claim(s) from the Estate subject to any and all defenses that BPA would have against the Estate. *Halver v. Welle*, 44 Wn.2d 288, 295, 266 P.2d 1053 (1954). Dunn does not dispute this. Thus, the court's analysis of Dunn's claims is made as though it were the Estate pursuing these claims now.

### A. The statute of limitations expired on Dunn's claims, however they are characterized, before she filed suit.

The statute of limitations on a claim for unjust enrichment is 3 years (RCW4.16.080(3); *SPEEA v. Boeing Co.*, 139 Wn.2d 824, 991 P.2d 1126 (2000); *Halver v. Welle*, supra.). The statute of limitations for conversion is also 3 years. RCW 4.16.080(3); *Crisman v. Crisman*, 85 Wn. App. 15, 931 P.2d 163 (1997).

The statute of limitation runs from the time a claim accrues; a claim accrues when a party has the right to apply to a court for relief. *1000 Virginia P'shp. v. Vertecs Corp.*, 158 Wn.2d at 566, 575-76, 146 P.3d 423 (2006).

There is no question but that the Estate's claims against BPA – however they might be characterized – accrued no later than December 19,

2013, when Commissioner Velategui ordered Dunn removed as PR, ruled that the payments were improper, and ruled that the Estate (via the new PR) needed to try to recover the funds. At that time, the Estate knew that the funds had been given to BPA free and clear; knew that the amount given to BPA was in error; knew that BPA, along with the other charitable beneficiaries, would be expending the funds for their charitable missions; knew that BPA was unaware of the error; and knew that it had the legal right – indeed, the legal duty, per Commissioner Velategui’s Order – to seek recovery of those funds.

Dunn doggedly persists in claiming that either March 19, 2015 (*App. Brief at 2, 12, 13, 16*) or August 5, 2015 (*App. Brief at 2, 6, 9, 13, 16*) are the earliest dates at which her claims would have accrued. But Dunn misleads the court by omitting any mention of what actually took place in the critical December 19, 2013 hearing and rulings by Commissioner Velategui. Dunn fails to acknowledge that Commissioner Velategui ruled that the payments were in error, that the new PR needed to try to get the money back, and that Dunn would be liable to the Estate for any funds that could not be recovered. Had the court not made that ruling, the new PR would have had no reason to issue her letter of Match 2015 to the charities, on which Dunn places such emphasis (**CP 104**), and which states that the prior payment were not proper, and violated the terms

of the will.

Moreover, Dunn herself previously acknowledged the effect of that 2013 ruling in materials she submitted for the August, 2015 hearing, stating:

The successor administrator was charged with recovering from Ms. Dunn any estate assets. . . . [and] was further charged with recovering from the charitable beneficiaries the funds transferred to them by Ms. Dunn from the estate. Ms. Dunn worked with [the new PR] . . . and cooperated fully in meeting the terms of the December 19, 2013 Order. . . . The successor administrator was further charged with recovering from the charitable beneficiaries the funds transferred to them by Ms. Dunn from the estate. . . . It is unknown by Deborah Dunn whether [the new PR] brought any legal actions against the charitable beneficiaries for the return of the moneys.

**CP 200** Yet Dunn, in a remarkable lack of good faith and candor to this court, persists in ignoring and/or mischaracterizing the substance of Commissioner Velategui’s December 2013 ruling and Order, which is dispositive of all issues on appeal.

Arguments on appeal must be supported by legal authority. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Dunn has cited no authority to suggest that the statute of limitations began to run any later than December 19, 2013. Dunn cites one case, *Young v. Young*, 164 Wn.2d 477, 191 P.3d 1258 (2008), for the proposition that the statute of limitations began to run only after BPA was notified of the issue and declined to “return” the funds (which had already

been spent). But *Young* does not address that issue at all. The case involved a quiet title claim by Judith Young against her nephew James, who counterclaimed for unjust enrichment based on improvements he had made to the property. The only issue on appeal was the measure of recovery on the unjust enrichment claim. *Young*, 164 Wn.2d at 477. The issue of when the claim accrued, and how the statute of limitations applied, were never even mentioned in the court's opinion.

Here, the fact that the probate court made further rulings and entered another order and judgment in August 2015 is of no import. On December 19, 2013, the Estate knew that a mistake had been made, knew that it had a claim to the excess funds, and knew that it needed to pursue recovery from BPA and the other charities. Its claims had accrued. But Dunn, as assignee, waited until November 2017 to file suit – approximately 11 months after the 3 year statute of limitations had expired. The trial court correctly dismissed Dunn's claims on this basis.

- B. Dunn's unjust enrichment claim fails because even if that theory applies in Washington, the Estate's payment was voluntary, and there was nothing "unjust" about BPA's receipt and use of the funds.

Dunn cites no Washington law applying an unjust enrichment theory to these facts. Dunn therefore falls back on a quote from the *Executors and Administrators* volume of American Jurisprudence (*Am.*

*Jur.*): ““A distributee who has received more than his or her fair share in a distribution must respond to demands for reimbursement when found in possession of other people’s money.”” *App. Brief at 10*.

The example given in this *Am. Jur.* section, however—a previously unknown, newly disclosed heir—does not support Dunn’s argument. BPA was a known beneficiary the entire time. Moreover, the “unless” language Dunn quotes from *Am. Jur.* §928 support BPA’s position, not Dunn’s. §928 states that a distributee who received more than his or her fair share must return the property improperly received “unless the distribution or payment no longer can be questioned because of adjudication, estoppel, or limitation.” *App. Brief at 10*.

In general, of course, Washington does recognize the theory of unjust enrichment, which is also sometimes referred to as a quasi-contract arising from an implied legal duty or obligation. The theory applies when the enrichment was unjust, and the plaintiff was not a “mere volunteer.” *Lynch v. Deaconness Medical Center*, 113 Wn.2d 162, 165, 776 P.2d 681 (1989). Dunn would need to establish that (1) she conferred a benefit on BPA, (2) BPA knew of or appreciated the benefit, and (3) the circumstances make it inequitable for BPA to retain the benefit without payment of its value. *Id.* (citing *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008)).

Here, Dunn fails to show any unjust enrichment. First, the Estate, acting to carry out Yukiko Howell's wishes, was a volunteer. A person is a "volunteer" if he or she acts freely and without compulsion. A person is under "duty or compulsion" if he or she acts to fulfill his or her own legal duty, to protect his own rights or to save his own property, or in some other way not freely and voluntarily chosen by him. *BNC Mortgage, Inc. v. Tax Pros, Inc.*, 111 Wn. App. 238, 46 P.3d 812 (2002). Here, the Estate gave BPA the funds as a gift, with no strings attached, and with no obligation on BPA's part to manage the funds for the Estate or anyone else. Howell, and her Estate, did not give BPA the funds to meet Howell's legal duty to BPA, or protect her own property, or in any way not freely and voluntarily chosen. The funds were a gift. *Cf. Trane Co. v. Randolph Plumbing*, 44 Wn. App. 438, 722 P.2d 1325 (1986) (Trane delivered heating equipment to third party, which incorporated it into project for Randolph; Trane not a volunteer because third party ordered the materials from Trane).

Second, BPA itself was not enriched by Howell's testamentary gift. It is important to bear in mind that BPA was merely a charitable conduit for the funds that Yuki Howell bequeathed – BPA held the funds for the ultimate benefit of the scholarship recipient, and neither received nor retained any benefit itself as far as those funds were concerned. By

the end of 2014, it had disbursed those funds in the form of five pilot scholarships, according to Howell's wishes. BPA itself gained nothing from these funds; all BPA received is a lawsuit, years later, from the at-fault PR, Dunn.

Third, there is nothing unjust about making Dunn bear the loss. During that entire period, the Estate was on notice that Ms. Dunn had improperly calculated and distributed the charitable gifts to charity—yet took no steps to notify BPA. The Estate, and Dunn, remained silent during that entire period, knowing that the whole point of the bequest to BPA was for BPA to give the funds away to scholarship recipients, which is exactly what BPA did. That silence led to a change in BPA's position “which would make it inequitable to enforce” Dunn's claims. *Waldrip v. Olympia Oyster Co.*, 40 Wn.2d 469, 477, 244 P.2d 273 (1952). The injustice here is Dunn's, for suing a proper beneficiary to recover funds she herself improperly distributed and that BPA, because of the Estate's and assignee's lack of diligence and inexcusable delay, no longer possessed.

- C. Dunn cannot establish a conversion claim, where the money was given to BPA free and clear and the Estate did not retain any property interest in the funds.

Conversion occurs when a defendant intentionally interferes with chattel belonging to another, either by taking or

unlawfully retaining it, thereby depriving the rightful owner of possession. *Alhadeff v. Meridian on Bainbridge Island, LLC*, 167 Wn.2d 601, 619, 220 P.3d 1214, 1223 (2009). Money is not a chattel, and so a conversion claim generally will not arise where a defendant allegedly keeps money entrusted to him by the plaintiff, unless the money is “specific funds” that the defendant is to hold for the plaintiff and then return to the plaintiff at a later date, or otherwise use those specific dollars for a specific purpose designated by the plaintiff.

BPA has not found a case where the “specific funds” exception was applied by the court to support a claim for conversion of money. An example of the contrary result, which demonstrates the analysis, is *Seekamp v. Small*, 39 Wn. 2d 578, 583, 237 P.2d 489, 492 (1951). There, plaintiff gave defendant \$1,500 to purchase onions in the futures market. The defendant purchased several loads of onions, including those for other investors/purchasers, and later sold all of the onions (at varying prices) and distributed the proceeds to the investors based on the average sale price. Plaintiff sued, claiming he was owed more because “his” onions supposedly were sold at a higher than average price. The trial court dismissed the conversion claim, and the supreme court affirmed:

Appellant cites some authority in support of his position;

however, this court has previously committed itself to the rule followed by the trial court.

In *Davin v. Dowling*, 146 Wash. 137, 262 Pac. 123, we said: "Money, under certain circumstances, may become the subject of conversion. But there can be no conversion of money, unless it was wrongfully received by the party charged with conversion or unless such party was under obligation to return the specific money to the party claiming it."

The rule stated in the *Davin* case, *supra*, is supported by the weight of authority. Bowers, *The Law of Conversion*, § 18. Tested by this rule, it is apparent that the evidence in this case was insufficient to make out an action in conversion. The only reasonable inference from the evidence was that respondent was not required to deliver specific money to appellant.

*Seekamp*, 39 Wn.2d at 583.

This is a very different case even from *Seekamp*. None of the cases cited by Dunn (*App. Brief at 11-12*) supports the proposition that a charitable bequest in a will, when paid to the beneficiary in an erroneous amount, can support a claim for conversion. The fundamental reason is this: the funds were a gift, given free and clear by the Estate to BPA, with no expectation by either party that the funds would be used for the Estate's benefit or subject to the Estate's control. The funds became BPA's property upon receipt and deposit of the check – the Estate no longer owned the funds or had any claim to or control over them.

A party simply cannot be liable for converting property that has been given to them free and clear. Conversion requires that the *plaintiff's*

property be improperly acquired or retained by the defendant – there is no claim for conversion where the plaintiff has relinquished any right, title, claim or interest in the funds. Indeed, this is the exact holding of one of the cases Dunn relies on (*App. Brief at 11*). In *Davenport v. Washington Educ. Ass’n.*, 147 Wn. App. 704, 197 P.3d 686 (2008), agency shop fees had been paid to WEA by representative non-members of WEA. They objected when WEA used some of those funds for political lobbying, and sued, alleging conversion as well as statutory claims. Applying the very generous (to the plaintiffs) standard of review on a CR 12(b)(6) motion, the court of held that no conversion claim existed. The court first stated the rule that the plaintiff must have retained a “property interest” in the funds:

[Conversion] treats money as a chattel only if the defendant "wrongfully received" the money or "was under obligation to return the specific money to the party claiming it." Absent a "property interest" of the required type, an action for conversion will not lie, for at most the defendant has only failed to pay an unsecured debt.

*Davenport*, at 695-96 (footnotes omitted). The court went on to explain that the plaintiffs had no such property interest or right, because (1) WEA lawfully received the funds at the outset, and (2) those funds, when delivered to WEA, were not under any prohibition or limitation as to how they were to be used. The court summarized it this way:

Because nothing in the Washington law that existed at that time restricted the manner in which WEA could later use the money, the transfer was unconditional, WEA became the sole owner and possessor of the money transferred, and the nonmember did not obtain the "property right" necessary for conversion.

...

Accordingly, we conclude that the plaintiffs do not have the kind of "property interest" that they need to sue for conversion, and that they have not stated a cause of action for that tort.

*Davenport*, at 696.

That is exactly the case here. There was nothing “wrongful” about BPA’s receipt of funds freely and voluntarily given by Dunn. And the Estate retained no property interest when it gave the funds, free and clear, to BPA. Dunn’s conversion claim fails as a matter of law.

D. Even if Dunn’s claims were otherwise cognizable and her Complaint had been timely filed, they are barred by equitable estoppel.

The elements of equitable estoppel are: (1) an admission, statement, or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act. *Harbor Air Serv., Inc. v. Board of Tax Appeals*, 88 Wn.2d 359, 366-67, 560 P.2d 1145 (1977). Estoppel can arise through silence, as well as statements, when one has a duty to speak out. *Kessinger v. Anderson*, 31 Wn.2d 157, 169, 196 P.2d 289 (1948) (quoting 21 C.J.S. *Estoppel* § 116, at

1113 (1920)).

This case is a textbook example of equitable estoppel. First, the Estate acted inconsistently with the claim it's assignee is now making: the PR (Dunn) had been duly appointed by the court, and in October 2013 distributed \$15,000 to BPA, free and clear, pursuant to the terms of Howell's will. There were no strings attached. Second, in reliance on the receipt of those funds, BPA awarded all of the funds to five scholarship candidates, who then spent the funds on their aviation training, just as Howell and the Estate had intended and expected. That took place over a 12-15 month period, during which the Estate remained silent and never contacted BPA about the alleged error. Third, the Estate (via its assignee, Dunn, the original wrongdoer) is now claiming that the distribution was an error and that BPA should pay it back – long after the funds were spent by BPA for their intended and expected purpose.

This would work a substantial injury on BPA, which is a volunteer organization with limited funding, and which itself received no benefit at all from the bequest. It is difficult to imagine a more clear-cut example of justifiable reliance, and wrongful injury to BPA, if Dunn's claims were allowed to proceed.

Dunn's arguments to the contrary are without merit. First, Dunn

argues that the July 2013 TEDRA petition put BPA on equal footing with Dunn as to the relevant facts. But the petition merely addressed the “amendment” and “codicil”, and did not raise any issue of what “10%” meant. The critical events began taking place in late October 2013, *after* Dunn gave the funds to BPA, when other beneficiaries raised objections to Dunn’s payments, culminating in the December 2013 hearing. BPA was never put on notice of those events and proceedings – and those are the ones that matter. Had Dunn provided such notice, or even if some other involved party had done so, this entire case surely would have been avoided. **CP 98, 103** But they failed to do so, and that failure is chargeable to them, not BPA.

Dunn’s characterization of BPA’s disbursements of the funds as “normal” day to day expenses likewise misses the mark. First, as explained above, BPA obtained no benefit at all from these funds – unlike a bequest to a relative or other person who might use the funds for paying the rent, getting the car repaired, etc. (“normal expenses”), or even used the funds to do something they would not otherwise have done, such as a trip to Hawaii with their family which they could not otherwise have afforded (an “extraordinary expense”). AS REST. (3D) RESTITUTION § 65 explains, “the more important test relates to the nature of the expenditure. Spending money is not normally a change of position *unless the*

*consequence of rejecting the defense (and imposing a liability in restitution) would be a net decrease in the recipient's assets. Expenditures devoted to extraordinary consumption or to gifts have this effect; ordinary living expenses, debt repayment, and the acquisition of capital assets generally do not.” Id. at 522-23 (emphasis added).*

That is exactly the case here. BPA's disbursement of the funds was a gift – in effect, the mere transmittal by an intermediary of the gift Yuki Howell made. Like any small charitable organization, BPA can only distribute the funds it has – if the funds don't come in, they don't get distributed. BPA typically has a waiting list of scholarship applicants, and – as in this case – typically distributes all monies received with a period of months, **CP 103** The Howell gift was quite significant to BPA, was promptly earmarked by BPA for use, and funded five full youth aviation scholarships, which was a majority of the scholarship funds disbursed by BPA in 2014. **CP 103** BPA used the funds up, and BPA does not have the money to pay Dunn back, even if she were entitled to it.

**CP 98**

The evidence established equitable estoppel as a matter of law.

E. Dunn's appeal is frivolous and BPA should be awarded fees.

BPA requests an award of attorney fees pursuant to RAP 18.9(a), under which this court can award attorney fees for the filing of frivolous

appeals. An appeal is frivolous when the appeal presents no debatable issues on which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal. *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691, 732 P.2d 510 (1987); *Boyles v. Department of Retirement Sys.*, 105 Wn.2d 499, 508-09, 716 P.2d 869 (1986); *Stiles v. Kearney*, 168 Wn. App. 250, 260, 277 P.3d 9, *review denied*, 175 Wn.2d 1016 (2012).

That is the case here. On the central issue of the statute of limitations, Dunn cites no law to support her arguments, and that issue disposes of the case regardless of Dunn's or BPA's arguments on the substantive claims. Most telling is Dunn's studious and persistent avoidance of the substance of Commissioner Velategui's December 19, 2013 ruling and Order, especially in light of Dunn's own submittal to the probate court in August 2015, where she acknowledged the effect and import of that court's prior Order. There was simply no debatable issue about when the Estate's (now Dunn's) claims accrued, and that her filing of this action was many months too late.

In addition, on her conversion claim she cites law (*Davenport v. Washington Educ. Ass'n.*, 147 Wn. App. 704, 197 P.3d 686 (2008)) that directly refutes her own position, and confirms that no such claim could arise in this setting. And her arguments as to equitable estoppel, which applies to her claims regardless of how they are framed, completely ignore

the unchallenged evidence that BPA, the charitable beneficiary, received no benefit itself, and instead had passed on all the funds that Dunn gave it on exactly what Yuki Howell intended and Dunn and the Estate expected (scholarships for flight students) by the time the Estate, after an inexplicable 15 month delay, notified BPA of the issue.

## **VI. CONCLUSION**

Dunn raises no colorable argument to support reversal of the superior court's order. There is no legal or factual basis to allow Dunn to pursue her claims against BPA when she unilaterally caused the problem in the first place with the excess payment, and then failed to notify BPA when the issue arose, and then sat back while the Estate (via the new PR) also sat back and allowed 15 months to pass, knowing that BPA was in the dark about the entire problem and was spending the funds for their intended purpose. And on top of that, Dunn then sat by for more another 2.5 years before filing suit.

This court should affirm the superior court's dismissal of Dunn's claims, and award BPA its reasonable fees and costs on appeal pursuant to RAP 18.9(a).

RESPECTFULLY SUBMITTED on 11 October 2018.



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

DEBORAH DUNN,

Appellant,

v.

BREMERTON PILOTS ASSOCIATION,

Respondent.

NO: 51676-4-II

CERTIFICATE OF SERVICE

I, Deborah Davies, certify that on October 12, 2018, I caused copies of the following documents to be served on the party listed below by the method(s) indicated for each:

1. *Brief of Respondent Bremerton Pilots Association; and*
2. *Certificate of Service.*

Via Email per prior agreement:

***Attorney for Plaintiff***

Stephen Michael Hansen

Law Office of Stephen M Hansen PS

1821 Dock St Unit 103

Tacoma, WA 98402-3201

1 I certify under penalty of perjury of the laws of the State of Washington  
2 that the foregoing statements are true and correct.

3  
4 DATED October 12, 2018 at Poulsbo, Washington.

5 

6  
7 \_\_\_\_\_  
8 Deborah Davies  
9 Legal Assistant  
10 HELLER WIEGENSTEIN PLLC

**HELLER WIEGENSTEIN PLLC**

**October 12, 2018 - 3:18 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
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**Superior Court Case Number:** 17-2-02040-2

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