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No. 52049-4-II

Pierce County Superior Court Case No. 16-4-00578-3

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

TERESA L'AMARCA

Plaintiff/Appellant,

v.

**JOSEPH J. L'AMARCA, JR., a single man; and JEANNIE A.
L'AMARCA, a single woman; and JEANNIE A. L'AMARCA, as
Personal Representative of the Estate of Joseph L'Amarca, Sr.
Respondents/Appellees**

BRIEF OF RESPONDENT

JOSEPH J. L'AMARCA, JR.

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I. INTRODUCTION

Respondent Joseph J. L’Amarca, Jr. (“Junior”) is the sibling of Appellant Teresa L’Amarca (“Appellant”) and the son of Joseph L’Amarca, Sr. (“Senior”), who died in March of 2016. In 1988, L’Amarca, Jr. entered into a real estate contract to purchase a single-family residence located at 3311 Bridgeport Way, University Place, Washington (“Property”). Junior agreed to pay \$49,500 with a down payment of \$1,000, monthly installment payments of \$450 and a balloon payment of \$4,000 due May 1, 1989. *CP 633-634*. In 2006, after all of the payments had been made, the Property was deeded to Junior. Junior leased the Property for a time. Later, he agreed to allow his father, Senior, to live there after Senior separated from his wife (Junior’s mother, Linda Kartes). Senior agreed to pay the costs associated with the Property while living at the Property. Those costs included the \$450 per month loan payments and the property taxes. Senior lived at the Property until shortly before his death in 2016.

In 2003 (while living at the Property), Senior obtained a home equity line of credit from Washington Mutual Bank for \$90,000. Despite not owning the Property, Senior used it as collateral and delivered a deed of trust to secure the HELOC. Junior was unaware of this at the time the loan was obtained. The Appellant never has disputed that Senior had no interest in the Property when he misrepresented to Washington Mutual Bank he was

the owner of the Property and used it as collateral. The Appellant does not challenge the Superior Court's findings of fact concerning the HELOC. The trial court found no evidence to indicate that Senior had any right, title or ownership interest in the Property at that time. *CP 512 (lines 9-12)*.

Senior's deception went even further than using the Property as collateral for the HELOC. In 2006, Senior recorded a Deed and Assignment of Real Estate ("Deed and Assignment") bearing a forged signature of Junior. Senior represented to attorney/notary Douglas Sulkowsky ("Sulkowsky") that he was, in fact, Junior. Senior's actions placed a cloud on title to the Property and, when Senior died, Junior filed a creditor's claim with the estate's personal representative, Jeannie L'Amarca ("Jeannie"). Jeannie approved the creditor's claim and quitclaimed the Property, on behalf of the estate, to Junior. Teresa L'Amarca ("the Appellant") filed a TEDRA action in response, alleging fraud by Junior and Jeannie. Notably, prior to filing her TEDRA action, the Appellant filed the same claims in a separate civil action, which was dismissed. The TEDRA action contained identical claims.

In April 2018 a three-day TEDRA evidentiary hearing was held before Pierce County Superior Court Judge Susan Serko. Among other things, she made findings of fact that the Property belonged to Junior and

found no fraud by Junior and/or Jeannie. Judge Serko further awarded attorneys' fees and costs to Junior and Jeannie.

II. ISSUES PERTAINING TO DECISION

Did the trial court properly exercise its discretion in making findings of fact and conclusions of law pertaining to that creditor's claim filed by Junior regarding the fee ownership of the Property and the personal representative Jeannie L'Amarca's conduct concerning the creditor's claim?

Was there substantial evidence to support the trial court's determination that personal representative Jeannie L'Amarca did not breach her fiduciary duty as a personal representative with regard to her handling and settlement of the creditor's claim filed by Junior?

Was there substantial evidence to support the trial court's determination that there was no fraud or wrongdoing by Junior or Jeannie L'Amarca concerning the settlement of the creditor's claim and the ownership of the Property?

Was there substantial evidence to support the trial court's determination that the Appellant failed to prove each element of her fraud claim against Junior and Jeannie L'Amarca?

Was the trial court within its discretion to award attorneys' fees and costs, pursuant to RCW 11.96A.150 and RCW 4.28.328, to Junior and Jeannie L'Amarca?

III. STATEMENT OF FACTS

Senior died on March 14, 2016. He had four surviving children: Junior, Anthony L'Amarca, the Appellant and Jeannie. *CPI*; *CP 9*. He died testate, leaving his entire residuary estate to the Appellant and Jeannie only. *CP 2*. His two sons, Junior and Anthony L'Amarca, were not included as devisee in the Will. *CP 2*. The Estate of Joseph L'Amarca, Sr. was probated in the Pierce County Superior Court, Cause Number 16-4-00578-3, and it was consolidated with a TEDRA action filed by the Appellant. *CP 8-10*; *CP 19-20*. The TEDRA action was precipitated by a creditor's claim filed by Junior in the probate and after negotiation was settled and approved by the estate's personal representative, Jeannie, who released the estate's claim of right or title to the Property to Junior. *CP 627-653*.

The filing of the creditor's claim by Junior was preceded by a series of events that occurred over a period of decades, involving the L'Amarca family. On November 9, 1988, Junior entered into a Real Estate Contract with Tony Trunk ("Trunk") for the purchase of the Property. *VRP 171:3-1*; *VRP 272:13-272:19*; *VRP 273:14-273:19*; *CP 633-634*. The "purchaser" was identified as "Joseph J. L'Amarca, Jr., a single man". *Id.* The purchase

price was \$49,500. *Id.* The Real Estate Contract indicated that \$1,000 had been paid. *Id.* Subsequent payments of \$450.00 per month were to be made by Junior for the balance of the purchase price. *Id.*; *VRP 275:8-273:13*. The Real Estate Contract was recorded under Pierce County Auditor file number 8811180297. *CP 633-634*.

The agreement between Junior and Trunk was fully substantiated at the evidentiary hearing. Trunk testified that he entered into the Contract with Junior. *VRP 171:3-171:11*. Trunk verified, under oath, that his agreement to sell the Property was expressly with Junior. *VRP 179:22-179:24*. Trunk also testified that he knew both Senior and Junior, and he intended specifically to sell the Property to Junior. *VRP 181:9-181:11; VRP 170:21-170:25; 171:1-171:2*. Trunk testified that he signed a deed conveying title to Junior, specifically. *VRP 172:6-172:17*. Junior also testified at the hearing, under oath, about the agreement with Trunk. *VRP 272:13-272:19; VRP 273:14-273:19*.

Initially after purchasing the Property, Junior leased it to tenants to help with the payments. *VRP 277:1-277:7*. In 1990, Junior leased the property to a couple, Tony and Lois Colvin. *VRP 277:1-277:2; 281:7-281:12*. As owner of the Property and landlord, Junior entered into a Residential Lease Agreement and Security Deposit Receipt with the Colvins. *Id.* Junior evicted the Colvins from the Property by filing an action

for eviction in Pierce County Superior Court. *VRP 278: 7-25; 279:1-279:9; trial exhibit 20 (Eviction Complaint)*. In the eviction complaint, Junior, the Plaintiff, stated that “Plaintiffs are owners of the real property.” *Id.* In the eviction proceeding, the Court found that Junior was the owner of the premises located at 3311 Bridgeport Way. *VRP 280:14-280:24*. In an Order of Default and Default Judgment, Junior, as the landlord and the owner of the Property, was awarded a judgment against the tenants in the amount of \$1,211.39. *VRP 280:14-280:24; trial exhibit 23 (Order of Default and Default Judgment)*. At the TEDRA evidentiary hearing, the eviction records and testimony provided incontrovertible evidence of Junior’s ownership of the Property and this evidence refuted the Appellant’s allegation that Senior resided at the Property continuously from 1988 until his death in 2016. The eviction records, admitted as evidence, strongly corroborate Junior’s contention that he, not his father, was the owner of the Property.

Senior separated from his wife in the 1990s and Junior offered to let Senior live at the Property. *VRP 305:11-305:19*. Senior, in exchange, agreed to pay the mortgage, the property taxes and any other costs of maintenance associated with the Property. *VRP 275:14-275:23; VRP 305:11-305:19*.

After living at the Property for some time, Senior took advantage of the similarity in names with his son, for his own benefit. In 2003, and

unknown to Junior, Senior obtained a home equity line of credit (“HELOC”) from Washington Mutual Bank. *VRP 283:21-283:25*. Senior used the Property as collateral for the line of equity, falsely representing to Washington Mutual Bank that Trunk was under contract to sell the Property to Senior. *CP 636-641*. At the TEDRA hearing, there was no dispute that Senior misrepresented the fact that he was not the owner of the Property to obtain the HELOC. In fact, the evidence fully supported the contention that Senior had wrongfully obtained the HELOC. Furthermore, when serving as the personal representative of the estate, Senior’s former wife made payments on the loan, acknowledging it to be an obligation of Senior’s estate. *VPR 254:21-254:25; 255:1*. It is undisputed that Senior was in fact not the owner of the Property at the time he obtained the HELOC. It is also undisputed that Senior took advantage of the name similarities between father and son to secure the HELOC that had a maximum line of credit of \$92,450.00. There is no evidence the HELOC was used to pay Trunk.

After Senior obtained the HELCO, he proceeded to secure the Property for himself. On October 28, 2004, without Junior’s knowledge, Senior executed a Deed and Purchaser’s Assignment of Real Estate Contract (“Deed and Assignment”) purporting to convey the Trunk Real Estate Contract vendee’s interest from Junior to Senior. *CP 643-644*. The Deed and Assignment was witnessed and notarized by Sulkowsky. *Id.* The

document was not recorded until two years later, on October 13, 2006, as Pierce County Auditor recording number 200610130378. *Id.* Senior took advantage of the fact that he and his son shared a name, but for the different suffix: the Deed and Assignment was signed as “Joey L’Amarca”. *Id.*

At the evidentiary hearing, the Appellant relied heavily upon the testimony of Sulkowsky as a witness of the execution of the Deed and Assignment. However, Sulkowsky repeatedly admitted (as he had done in his deposition) that he had no recollection of the events surrounding the signing and notarizing of the Deed and Assignment. *VRP 45:18-45:20; 51:8-51:14; 52:14-52:25; 53:1-5; 60:1-60:16; 62:3-62:25; 63:1.* He further admitted that his files regarding the transaction had been destroyed. *VRP 45:9-11.* Although Sulkowsky testified it was his usual practice to ask for identification when executing notarized documents, he had no recollection as to whether he did so or saw an identification of the signor in this instance. *VRP 63:7-63:17.*

Two declarations executed by Sulkowsky were offered as evidence at the hearing: one dated January 30, 2017 and one dated May 11, 2017. *VRP 37:3-37:15; trial exhibit 3 (January Declaration); VRP 41:22-41:2; VRP 43:16-43:17; VRP 57:21-25; 58:1-58:1; trial exhibit 4 (May Declaration).* Sulkowsky testified that, unlike his hearing testimony, his January 30, 2017th declaration did not state that he had requested to see

identification with regard to the Assignment and Deed. *VRP 45:23-45:25; 46:1*. He conceded that any recollection of events he had at all was based solely on a calendar entry, which he had not produced, though he had been asked to do so. *VRP 58:16-58:19; VRP 59:8-59:10*. He also testified that, at his deposition, he had been unable to identify a photograph of Junior, although he claimed that Junior had appeared and signed the Assignment and Deed. *VRP 53:6-53:9*. Ultimately, the trial court found that Sulkowsky was not reliable as he had no recollection of having notarized the signature on the Assignment and Deed and had no recollection that the signer was, in fact, Junior. *CP 514, lines 8-11*.

The Appellant also relied heavily upon the testimony of an alleged expert in handwriting, Brian Forrest (“Forrest”). The testimony was presented over objections to his credentials and qualifications and motions *in limine* to exclude his testimony. However, the issues with this expert and his testimony were myriad and, ultimately, the trial court found him not to be credible (although the Court did initially qualify him as an expert). *CP 514, lines 14-20*. The issues with Forrest’s opinion and testimony can be summed up as a lack of qualifications and lack of probative handwriting samples. With regard to his qualifications, these were sparse. His education was admittedly through an online program from an unaccredited school. *VRP 97:18-97:24; 98:10-98:20*. Forrest had never previously been

qualified as an expert. *VRP 99:23-99:25; 100:1-100:2*. Forrest did not belong to any professional association. *VRP 101:1*. He held no business licenses. *VRP 101:12-101:15*. He completed an apprenticeship; however, not in person. *VRP 101:21-101:25; 102:1*. He had neither written nor published any articles in his field. *VRP 102:8-102:12*. In short, he was not qualified to render an opinion on a handwriting sample.

Prior to opining that the Assignment and Deed had been executed by Junior and not Senior, Forrest examined undated and unverified writing samples the Appellant told him contained Junior's signature. All but one of the samples were simply a first name and not a full signature. *VRP 105:17-105:25; 106:1-106:4; 106:6-106:13; 154: 8-154-14*. All but one of the samples were undated birthday cards signed "Joey". *Id.* The single sample that included a full signature was from 13 years after the execution of the Assignment and Deed. *VRP 157:19-157:25; 158:1*.

On the stand, Forrest's testimony only further bolstered the fact that he had no reliable basis or support for his opinion. He admitted that he did not use verified signatures as his samples to compare handwriting and reach his conclusions. *VRP 107:17-107:19; 147:2-147:12; 154:15-154:18*. He admitted that he did not have a larger pool of samples (although Appellant's counsel attempted to cure this deficiency by having Forrest examine numerous additional documents on the eve of the hearing, well after Forrest

rendered his opinion and report, *see VRP 89:25; 90:1-90:25; 91:1-91:25; 92:1-92:7). VRP 107:20-107:22.*

Forrest admitted his samples were undated. *VRP 146:3-146:15.* He also admitted that he did not select the samples – they were selected by the Appellant’s counsel. *VRP 155:18-155:25; 156:1-156:3.* Forrest admitted he had asked Appellant’s counsel for more complete samples and that he did not know why he used the samples he was given. *VRP 156:8-156:25; 157:1-157:2.* He admitted that, ultimately, his opinion was based solely on the one full signature sample, which was 13 years older than the signature on the Assignment and Deed. *VRP 157:19-157:25; 158:1* (he also conceded that a person’s signature changes over time. *VRP 152:1-152:25; 153:1-153:12).* He also admitted that he failed to compare the more complete samples (provided later by Appellant’s counsel) to the original signature on the Assignment and Deed. *VRP 169:6-169:18.* Ultimately, although Forrest opined that the signature on the Assignment and Deed was that of Junior, the Court did not find his testimony credible or helpful. *CP 514, lines 14-15.*

Senior passed away testate on March 14, 2016. *CP 9, paragraph 2.1.* His Last Will and Testament left his estate equally to his daughters, Jeannie and the Appellant. *CP 2.* Senior left no provision for his sons, Junior and Anthony L’Amarca. *Id.*

Senior's former wife, Linda Kartes, briefly served as personal representative but was replaced with Jeannie, appointed personal representative on September 19, 2016. *CP 562-598; CP 603-606; CP 607-612; VRP 202:24-202:25; 203:1-203:3*. Jeannie was represented by counsel until April 25, 2017, and then again in April 2018, for the TEDRA hearing. *VRP 202:12-202:17*.

On February 3, 2017, Junior filed a creditor's claim with Senior's estate stating that the Property was his and that Senior had recorded the Assignment and Deed transferring title from Junior to Senior bearing a forged signature. *CP 627-653*. Junior provided evidentiary support for the creditor's claim, including the contract with Trunk and the HELOC obtained by Senior and secured by the Property. *Id.* Through the line of equity, Senior withdrew approximately \$28,000, thereby encumbering Junior's Property and clouding title. *Id.*

Also supporting the creditor's claim was the Statutory Warranty Deed in fulfillment of the Real Estate Contract dated September 29, 2006, signed by Trunk and recorded as Pierce County Auditor File No. 200610130377. *Id.* The creditor's claim was also supported by a declaration from Trunk, confirming that he intended to transfer the Property to Junior and not to Senior, as testified to by Trunk. *VRP 176:24-176:25; 177:1-177:2; trial exhibit 33 (Trunk Declaration)*. In his declaration, Trunk

recalled the facts concerning the conveyance of the Property. *Id.* He knew both Senior and Junior and that “[t]he distinction between the son and the father was known to me, and I unambiguously understood that the Property was being sold to the son, Joseph J. L’Amarca, Jr., and not to his father.” *Id.* Trunk also stated in the declaration that in 2006, the Real Estate Contract was paid in full and he signed and delivered a Statutory Warranty Deed dated September 29, 2006 in fulfillment of the Real Estate Contract. *Id.* He noted that it was his omission in the Statutory Warranty Deed to leave out the suffix “Jr.”. *Id.* He stated that “[t]he grantee on the Statutory Warranty Deed should have correctly read ‘Joseph J. L’Amarca, Jr., a single man.’”. *Id.*

On March 28, 2017, two months after receiving and evaluating the creditor’s claim (and while represented by counsel) Jeannie, as the personal representative, signed a Personal Representative’s Quitclaim Deed which was recorded with the Pierce County Auditor on April 13, 2017. *VRP 367:22-367:25; 368:1.* Ultimately, Jeannie entered into a Settlement Agreement with Junior, which acknowledged that the HELOC was a debt of the estate. *VRP 234:18-234:24.* Jeannie determined that the Property was not likely an estate asset and if litigation was pursued could be determined to belong to Junior. The Superior Court observed and noted that the settlement of Junior’s creditor’s claim went against Jeannie’s own self-

interest, as a beneficiary of the estate. *VRP 368:16-368:24*. Although the Appellant alleged that Jeannie and Junior colluded together, whereby Jeannie would benefit from the conveyance of the Property to Junior, no evidence was presented at the TEDRA hearing to support these allegations.

IV. ARGUMENT

A. Standard of Review

The Appellant listed 22 assignments of error; however, failed to identify the standard of review applicable to each. The following table identifies the standard of review for the 22 alleged errors:

Type of Error	Standard of Review	Errors Alleged by Appellant
Factual Finding	Substantial evidence	<p>No. 1 (Factual Finding that Senior used Junior’s identification & name)</p> <p>No. 4 (Factual finding there is no evidence Junior deeded property to Senior)</p> <p>No. 18 (Factual finding that Junior is owner of Property)</p> <p>No. 19 (Factual finding that Property was not asset of estate of L’Amarca Sr)</p> <p>No. 20 (Factual finding that no estate asset was transferred per creditor claim settlement)</p> <p>No. 22 (Trial Court erred in dismissing TEDRA claims)</p>

Type of Error	Standard of Review	Errors Alleged by Appellant
Credibility of testifying witness/conclusions of law at trial	Abuse of discretion	<p>No. 2 (Credibility of Junior’s testimony regarding Assignment and Deed)</p> <p>No. 3 (Credibility of testimony of Sulkowsky)</p> <p>No. 5 (Credibility of testimony of expert Brian Forrest)</p> <p>No. 6 (Credibility of expert Brian Forrest’s basis for his opinions)</p> <p>No. 7 (Trial Court’s decision that expert Brian Forrest’s qualifications do not support his conclusions)</p> <p>No. 8 (Trial Court’s decision that expert Brian Forrest’s testimony was not credible)</p> <p>No. 9 (Trial Court’s decision expert Brian Forrest’s testimony was not credible)</p> <p>No. 10 (Trial Court’s decision expert Brian Forrest’s testimony was not credible)</p> <p>No. 11 (Trial Court’s finding of lack of credible evidence to explain non-contemporaneous execution and recording of deeds)</p> <p>No. 12 (Trial Court’s finding of lack of credible evidence regarding why Junior would not convey property to Senior for no consideration)</p> <p>No. 13 (Trial Court’s finding that Jeannie L’Amarca’s testimony was credible)</p> <p>No. 14 (Trial Court’s finding that Jeannie L’Amarca’s actions</p>

Type of Error	Standard of Review	Errors Alleged by Appellant
		<p>regarding creditor's claim were in good faith – Jeannie credible)</p> <p>No. 15 (Jeannie L'Amarca's administration/payment of creditor's claim was not breach of fiduciary duty)</p> <p>No. 16 (Teresa L'Amarca failed to sustain burden of proof regarding common law fraud against Junior and Jeannie)</p> <p>No. 17 (Teresa L'Amarca failed to sustain burden of proof of showing by preponderance of evidence that Junior and Jeannie L'Amarca committed common law fraud)</p> <p>No. 21: Jeannie has not breached her fiduciary duties as PR</p>

i. Factual Findings: Substantial Evidence

The trial court's findings of fact are treated as verities on appeal, if supported by substantial evidence. *In re Marriage of Katare*, 175 Wn.2d 23, 35, 283 P.3d 546 (2012); *In re Marriage of Neha Vyas Chandola*, 180 Wn.2d 632, 642, 327 P.3d 644 (2014); *Keever & Assocs. V. Randall*, 129 Wn.App. 733, 737, 119 P.3d 926 (2005); *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn.App. 546, 555, 132 P.3d 789 (2006).

Although the *de novo* standard is applied for appellate review where the trial court's review and conclusions of law are based solely on a documentary record, appellate review of a trial court's findings and

conclusions of law where there has been testimony of witnesses is one of substantial evidence. *Zink v. City of Mesa*, 140 Wn.App. 328, 336, 166 P.3d 738 (2007) (citing *O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 904, 25 P.3d 426 (2001)); *Kittitas County v. Allphin*, 2 Wn.App. 782, 793, 413 P.3d 22 (2018).

Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). The appellate court reviews only those trial court findings of fact to which an appellant assigns error; unchallenged findings are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 314 (1994). On appeal, the appellate court views the evidence in the light most favorable to the prevailing party and defer to the trial court regarding a witness's credibility and conflicting witness testimony. *Weyerhaeuser v. Tacoma-Pierce County Health Dep't*, 123 Wn.App. 59, 65, 96 P.3d 460 (2004). Where the trial court proceeding turned on credibility and a factual finding, even where a trial court's decision is based on affidavits and other documentary evidence, the appropriate standard of review is substantial evidence. *In re Marriage of Rideout*, 150 Wn.2d 337, 350-51, 77 P.3d 1174 (2003).

ii. Witness Credibility – Conclusions of Law: Abuse of Discretion

The appellate court rarely reevaluates the trial court's decision concerning the credibility of witnesses. *Chatwood v. Chatwood*, 44 Wn.2d 233, 266 P.2d 782 (1954) (cited by *In re Marriage of Chandola*, 180 Wn.2d 632, 327 P.3d 644 (2014)), as corrected, (Sept. 9, 2014). The appellate court defers to the trial court's credibility determination "because of a trial court's unique opportunity to observe the parties to determine their credibility and to sort out conflicting evidence." *In re Marriage of Woffinden*, 33 Wn.App. 326, 330, 654 P.2d 1219 (1982).

As explained in *State v. Garza*:

[T]he *de novo* standard is better applied when the appellate court is in the same position as the trial court and may make a determination as a matter of law. **The abuse of discretion standard is appropriate when a trial court is in the best position to make a factual determination.**

State v. Garza, 150 Wn.2d 360, 366, 77 P.3d 347 (2003) (emphasis added).

B. The trial court's decision regarding Jeannie L' Amarca's handling of the creditor's claim was not an abuse of discretion and was supported by substantial evidence.

The Appellant argues that the trial court's decision regarding whether Jeannie breached her fiduciary duties as a personal representative in her handling of the creditor's claim was erroneous; however, that is not the case. There was substantial evidence to support this conclusion by the

trial court. The Appellant argues repeatedly that Junior and Jeannie colluded and committed fraud with regard to the creditor's claim and the Property; however, the Appellant does not identify a single piece of evidentiary support for this allegation. Her theory is that Junior and his sister, Jeannie, were colluding to gain the Property through Jeannie's actions as the personal representative and then, somehow, Junior would kick back money to Jeannie. Instead, what the evidence clearly showed, was that Jeannie took into account several important factors before settling the creditor claim despite the fact that she, as a beneficiary, would have benefitted had she concluded that the Property was an estate asset.

Jeannie testified that she reviewed the January 30, 2017th declaration from Sulkowsky and listened to a telephone call with Sulkowsky concerning the execution of the Deed and Assignment. *VRP 361:15-361:25; 362:1-362:22*. The Appellant argues that the declaration of Sulkowsky would have been sufficient evidence to compel Jeannie, as the personal representative, to reject the creditor's claim. However, the declaration was of no probative value. The declaration did not state that Junior signed the Deed and Assignment. Instead, it said that he, Sulkowsky, notarized "Joey L'Amarca's" signature, and then listed "aka's" (i.e., "aka Joseph J. L'Amarca, aka Joseph J. L'Amarca, Jr.")). *CP 649*. At the time of her decision to settle the creditor's claim Jeannie knew, as confirmed by the

testimony and documentary evidence at the TEDRA hearing, that Senior was known by several variations of the name, including his son's name. *See, e.g., VRP 336:2-336:4; CP 636.* Sulkowsky's declaration indicated that the individual who signed the Deed and Assignment did not identify himself as "Joseph J. L'Amarca Sr."; however, Senior rarely did so. Consequently, Sulkowsky's declaration was not dispositive as to the ownership of the Property.

Jeannie reviewed the 1988 Real Estate Contract between Trunk and Junior. It evidences an agreement for the sale and purchase of the Property, which Contract was submitted with the creditor's claim. *CP 633-634.* Jeannie also testified that before settling the creditor's claim she had reviewed the declaration from Trunk detailing how his agreement concerning the Property was with Junior and that he specifically intended to convey the Property to Junior, rather than Senior. *VRP 362:22-362:25; 363:1-363:8; trial exhibit 33.* She reviewed the Statutory Warranty Deed executed by Trunk conveying the Property as indicated by Trunk, in his declaration. *CP 647.* She also reviewed the documents related to the HELOC wrongfully obtained by Senior and believed the HELOC was a debt of the estate. *VRP 234:18-234:24; CP 636-641.*

It was Jeannie's responsibility, as personal representative, to either accept or reject the creditor claim as presented to her in her capacity as

personal representative. *RCW 11.40.080(1)* (“*The personal representative shall allow or reject all claims presented . . . The personal representative may allow or reject a claim in whole or in part*”). As a personal representative, Jeannie had to make a decision concerning the creditor’s claim within a relatively short period of time – 20 days. *RCW 11.40.080(2)*. She did not have an indefinite period of time within which to perform an extensive investigation; nor was that required under the law. Moreover, she did not have resources readily available to do more.

As a personal representative with nonintervention powers at the time the creditor’s claim was filed, Jeannie had absolute power, under the statute and provisions of the Will, at her discretion, tempered by that requirement that she operate as a fiduciary in her capacity as a personal representative. Pursuant to that fiduciary duty, when confronted with the creditor’s claim, Jeannie was required to conduct herself in good faith and honesty in the conduct of what an ordinary prudent person would be with their own affairs.

The facts, as presented to Jeannie through Junior’s creditor’s claim, were that Trunk held title to the Property, until he delivered the fulfillment Deed in 2006, when the payments were fully made. Accordingly, Trunk was the owner of the Property until that time. By delivering the fulfillment Deed to Junior (as Trunk testified he did) in 2006, Trunk transferred his fee interest in the Property to Junior. At the time the creditor’s claim was filed,

Jeannie knew, from Trunk's declaration, that the intention from the time the 1988 Real Estate Contract was entered into was to convey the Property to Junior.

The only fact that dictated against Junior's ownership of the Property was the Deed and Assignment purportedly signed by Junior, conveying the vendee's interest in the contract (for Property which Junior did not own at that time, because Trunk still owned it) to Senior. *CP 650-651*. Jeannie was informed by Junior that the Deed and Assignment had not been signed by him and likely was signed by his father, Senior. *VRP 364:7-364:8; 364:17-364:22*. She coupled this fact with the fact that their father, Senior, had lied to Washington Mutual Bank to obtain the HELOC – representing that he then owned the Property when, in fact, he did not. *CP 636-641*. The fact that Senior would misrepresent his ownership of the Property in 2003 was not inconsistent with the idea that he would forge or have someone else forge his son's signature on the Deed and Assignment in 2004, to convey the Property to himself.

When evaluating the creditor's claim, Jeannie also considered what her brother, Junior, had told her about his involvement with the Property. Jeannie had reason to trust Junior – he had always been honest with her and they had a good relationship as siblings. Jeannie testified that Junior looked out for her, especially after the death of their father, Senior. *VRP 364:23-*

364:25; 365:1-365:10. She had never had occasion in the past where Junior had deceived her. *VRP 365:15-365:17*. Under the law, Jeannie was entitled to rely upon statement by Junior as part of her investigation, if she found the statements credible, informed by her long relationship with him and based on the fact that he had always been honest with her.

In considering the creditor's claim, Jeannie, as the personal representative, also considered the effect of denying the claim and the fact that this likely would result in significant costs to the estate, which was just barely solvent. *VRP 366:16-366:25; 367:1*. She understood that by accepting the creditor's claim and acknowledging Junior as the owner of the Property she was giving up any interest she had in the Property, as a beneficiary. *VRP 369:18-369:21*. The fact that Jeannie, as personal representative, gave up her own self-interest by acknowledging the Property as belonging to Junior, mitigates against any finding of a breach by Jeannie of her fiduciary duty.

In fact, the trial court judge, who is uniquely tasked with assessing credibility of witnesses, found Jeannie to be "the most credible witness" who testified in the hearing. *CP 515 (paragraph 1.40)*. The trial court judge found that, as a legatee of the estate, Jeannie had nothing to gain personally and risked her own personal financial loss by accepting the creditor's claim and entering into the settlement agreement as she did. *Id.* As outlined

above, there is substantial evidence to support the trial court judge's finding regarding Jeannie's fulfillment of her fiduciary duty. What is notably absent from the court record and the evidentiary hearing is any evidence whatsoever of collusion between Junior and Jeannie or any fraud against the Appellant or the estate. Accordingly, the trial court did not abuse its discretion in finding that Jeannie had not breached her fiduciary duties as the personal representative when she accepted Junior's creditor's claim as valid and acknowledged that the Property was not an asset of the estate.

The case law cited by the Appellant in support of the argument that Jeannie's actions were wrongful and the court's decision an abuse of discretion are inopposite and factually distinguishable. In *Thompson v. Weimer*, 1 Wn.2d 145, 95 P.2d 772 (1939), the plaintiffs brought an action against the executor of the estate to enforce an equitable lien against the estate based upon an alleged oral contract with the decedent to devise property to the plaintiffs. *Thompson v. Weimer*, 1 Wn.2d 145, 146, 95 P.2d 772 (1939). *Thompson* is distinguishable from the case at hand. The plaintiffs in *Thompson*, unlike the Appellant, were bringing equitable claims based upon an alleged agreement with the decedent, outside of the Will and conflicting with the disposition according to the Will. In the instant case, the Appellant has no such equitable basis for a claim – her only standing is as a beneficiary of the decedent's Will. In *Thompson*, the

executor appealed, and the holding in *Thompson* must be limited to the following: a personal representative/executor can appeal a decision regarding the distribution of the estate assets, and nothing more.

Hesthagen v. Harby, 78 Wn.2d 934, 481 P.2d 438 (1971) is equally distinguishable and inopposite. In *Hesthagen*, the personal representative failed to perform any investigation to identify and notify additional heirs, even though the information was readily available to the personal representative and his attorney. *Hesthagen v. Harby*, 78 Wn.2d 934, 937-38, 481 P.2d 438 (1971). The personal representative had retained counsel, and counsel failed to conduct any investigation concerning additional heirs. *Id.* The court noted that statutory law presupposes that a personal representative, as an officer of the court and a fiduciary for the heirs and distributees, would make “an earnest effort in the course of his trust to determine who would be lawfully entitled to the estate.” *Id.* at 941, 481 P.2d 438. The trial court found that a reasonable inquiry or investigation by the administrator or his attorney would have readily identified the additional legatees. *Id.* The appellate court noted that an administrator is obligated to exercise good faith and to use the skill, judgment, and diligence which would be employed by the ordinarily cautious and prudent person in the management of his or her own trust affairs. *Id.* at 942, 481 P.2d 438. The

appellate court concluded that an administrator is liable for a breach of his or her responsibilities which cause loss to another. *Id.*

The facts in *Hesthagen* are notably distinguishable from those in the instant case. In *Hesthagen*, the administrator took no action whatsoever and conducted no investigation:

He initiated no inquiry, conducted no investigation, made no search, asked no questions, although avenues of discovery were easily available and open to him, and despite the fact that he had been dealing with the family affairs since 1958. Instead, he passively left these matters to his attorney, who, in turn, failed to make effective inquiry.

Id. at 943, 481 P.2d 438.

Jeannie, however, did investigate the validity of Junior's creditor's claim, reviewing recorded documents and declarations and talking with people, including the notary who witnessed the document that allegedly conveyed the vendee's interest in the Property from Junior to Senior, as discussed above. She had legal counsel, who also reviewed the documentary evidence for the claim. She considered the fact that Senior had wrongfully impersonated Junior in obtaining the HELOC and encumbering the Property. She considered a recent declaration from the seller of the Property, Trunk, who stated in no uncertain terms that he entered into the original agreement with Junior, intended specifically to sell

the Property to Junior and, in fact, did convey the Property to Junior. Unlike the administrator in Hesthagen who did no investigation whatsoever, Jeannie did a thorough and complete investigation with regard to the creditor's claim.

C. The trial court's rejection of constructive trust was not erroneous since the Property was never an asset of the estate.

The Appellant alleges the trial court's rejection of her constructive trust argument was erroneous. Notably, the Appellant's Petition did not allege a constructive trust claim. She did not move for amendment of her Petition claims under CR 15(c) at the time of trial. However, in closing argument, the Appellant's counsel argued that the Property was held by Junior in a constructive trust, since the conveyance to Junior was wrongful (although no evidence supported these allegations). The Appellant relies upon Hesthagen, as follows:

Where a fiduciary in violation of his duty to the beneficiary transfers property or causes property to be transferred to a third person, the third person, if he gave no value or if he had notice of the violation of duty, holds the property upon a constructive trust for the beneficiary.

Id. at 943, 481 P.2d 438.

Before the trial court could impose a constructive trust on the Property for the Appellant's benefit, two things would need to be

established: (1) the fiduciary (Jeannie) breached her fiduciary duty; and (2) the asset would have to be an estate asset. The trial court, based upon its discretion and substantial evidence, concluded that Jeannie did not breach her fiduciary duty with regard to the creditor's claim. Furthermore, as established at the TEDRA hearing through abundant evidence, the Property was never an asset of the estate – it was never the property of the decedent, Senior. At best, the estate had a breach of contract claim against Junior under the Assignment. Accordingly, there would be no basis for the trial court to create a constructive trust.

The Appellant further relies upon Hesthagen for the proposition that a constructive trust could be imposed even without a showing of wrongdoing. However, as the Washington Supreme Court stated in Pitzer v. Union Bank of California, 141 Wn.2d 539, 9 P.3d 805 (2000), this is not the case. In Pitzer, claimants claiming to be illegitimate children of the decedent brought an action to impose a constructive trust on the estate. Pitzer, 141 Wn.2d at 545, 9 P.3d 805. The claimants argued that Hesthagen stands for the proposition that no showing of fraud or other wrongdoing is necessary if a party brings an unjust enrichment claim seeking imposition of a constructive trust. Pitzer, 141 Wn.2d at 549, 9 P.3d 805. However, the Supreme Court disagreed:

Respondents argue that *Hesthagen* stands for the proposition that no showing of fraud or other wrongdoing is necessary if a party brings an unjust enrichment claim seeking imposition of a constructive trust, as opposed to an action to reopen a probate. Along these lines Respondents appear to argue that the simple fact that Rose Magrini received assets to which she would not be entitled, if Respondents could have proved former RCW 11.04.080 was unconstitutional during the pendency of Frank Magrini's probate, is enough to allow their claim if Rose Magrini failed to use "due diligence" in searching for heirs. We disagree. . . . As we stated in *Baker* (*Baker v. Leonard*, 120 Wn.2d 538, 843 P.2d 1050 (1993)): "Unless an equitable base is established by evidence of intent, there must be "some element of wrongdoing" in order to impose a constructive trust." We did impose a constructive trust in *Hesthagen* without a showing of purposeful wrongdoing. However, the original decree of distribution in *Hesthagen* was void, which would have allowed the claimants to attack the original decree of distribution if they had desired.

Pitzer, 141 Wn.2d at 549-550, 9 P.3d 805 (citations omitted).

In the instant case, the Appellant failed to prove through evidence any wrongdoing or collusion with regard to Junior's ownership of the Property.

D. The Appellant failed to prove through clear, cogent and convincing evidence, each of the necessary elements of fraud.

The Appellant argues that she proved the nine elements of fraud at the TEDRA evidentiary hearing; however, she did not. She misconstrues

her analysis of the elements of fraud to avoid having to prove her own reliance (and right to rely) on the allegedly false statement by interposing the personal representative, instead of the Appellant, as the claimant.

The Appellant alleged that Junior committed fraud on the estate by submitting a false creditor's claim. Accordingly, to prevail, the Appellant needed to prove each element of fraud by "clear, cogent and convincing evidence." *Stiley v. Block*, 130 Wn.2d 486, 504, 925 P.2d 194 (1996). The nine elements of fraud are: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by, in this case, the Appellant as claimant; (6) Appellant's ignorance of its falsity; (7) Appellant's reliance on the truth of the representation; (8) Appellant's right to rely upon it; and (9) damages suffered by the Appellant's. *Id.* at 505, 925 P.2d 194.

The clear, cogent and convincing standard requires evidence that convinces the trier of fact that the fact in issue is "highly probable." *In re Estate of Haviland*, 162 Wn.App. 548, 558, 255 P.3d 854 (2011). In determining whether the evidence meets the clear, cogent and convincing standard of persuasion, "the trial court must make credibility determinations and weigh and evaluate the evidence." *Id.* In other words, the facts relied upon to establish fraud must be clear, positive, and unequivocal in their

implication. *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 735, 853 P.2d 913 (1993).

Concerning the fraud claim brought by the Appellant against Junior, the Appellant failed to establish each of the nine elements with clear, cogent and convincing evidence at the TEDRA hearing. With regard to elements three (falsity), four (speaker's knowledge of its falsity), five (false statement was intended to be acted upon by claimant), seven and eight (Appellant's reliance upon the statement and right to rely upon it), the evidence offered fell far short of clear, cogent and convincing. In fact, the Appellant offered no credible evidence on these elements.

The alleged false statement is the creditor's claim filed by Junior. The Appellant must prove by clear, cogent and convincing evidence that the creditor's claim is false. The only evidence offered to this effect was the testimony of Sulkowsky, concerning the signature on the Deed and Assignment, and the testimony of Forrest, the handwriting expert. However, as discussed in depth above, neither of these witnesses were found to be credible. Sulkowsky's testimony was not found to be credible because he was unable to recall any specific facts regarding the execution of the Deed and Assignment. Forrest's testimony was not credible because of his lack of qualifications and because of his lack of probative samples from which to reach a conclusion concerning the signature on the Deed and

Assignment. No other evidence was offered to establish the falsity of the creditor's claim. The trial court determined that Junior's statements, as made in the creditor's claim and verified through his credible testimony, were credible and not false. The court found that Junior purchased the Property from Trunk in 1988 (*CP 510, paragraph 1.5*); that Junior fully paid for the Property in 2006 (*CP 511, paragraph 1.6*); that Trunk executed and delivered a statutory warranty deed in 2006 granting title to the Property to Junior (*CP 511, paragraph 1.7*); that Trunk credibly testified that his intent was to convey the Property to Junior (*CP 511, paragraph 1.8*); that at various times Senior used Junior's identification and name (*CP 512, paragraph 1.16*); and that Senior fraudulently obtained a HELOC by representing he was the owner of the Property (*CP 12, paragraph 1.17*). All of these findings support the veracity of the creditor's claim as a statement. Accordingly, the Appellant failed to prove the falsity of the statement, thereby failing to prove an element of her claim. Equally problematic for the Appellant is the fact that she was unable to provide evidence for the fourth element of her claim – that Junior knew that his statement (i.e., the creditor's claim) was false. He credibly testified as to the veracity of his statement in the creditor's claim.

With regard to the fifth element of a fraud claim (intent of the speaker that it should be acted upon by claimant) the Appellant cannot

establish the required proof. In her brief, the Appellant argues that the creditor's claim was intended to be acted upon by Jeannie, the personal representative, which is accurate. However, it is not Jeannie who is bringing the fraud claim – she is not the claimant. The claimant in the fraud allegation is the Appellant, and the Appellant cannot prove that the creditor's claim was intended to be acted upon by the Appellant. The creditor's claim was intended for action by the personal representative, not the estate's beneficiaries (i.e., the Appellant). The creditor's claim was substantiated with documentary evidence found to be credible by the trial court judge. The personal representative, in her discretion, could have rejected the claim. Accordingly, the Appellant failed to prove the fifth claim of fraud.

The Appellant also failed to establish with clear, cogent and convincing evidence elements seven and eight (her reliance on the truth of the creditor's claim; and her right to rely upon it). The Appellant provided no evidence whatsoever that she had a right to rely upon the truth of the creditor's claim or, in fact, did rely upon it.

The only evidence offered at the TEDRA hearing to support the Appellant's fraud claim against Junior was the noncredible testimony of Sulkowsy, who conceded that he had no specific recollection of the signing of the Deed and Assignment, and "expert" testimony of Forrest concerning the signature, who compared the signature essentially to undated birthday

cards with a first name only. Even if believed, none of this would indicate an intent on the part of Junior or Jeannie to collaborate in fraud.

E. The trial court's Findings of Fact and Conclusions of Law were supported by substantial evidence.

The Appellant's statement, in her brief, that the trial court's conclusions of law are reviewed *de novo* is inaccurate. As stated above, although the *de novo* standard is applied for appellate review where the trial court's review and conclusions of law are based solely on a documentary record, appellate review of a trial court's findings and conclusions of law where there has been testimony is one of substantial evidence. *Zink v. City of Mesa*, 140 Wn.App. 328, 336, 166 P.3d 738 (2007) (citing *O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 904, 25 P.3d 426 (2001)); *Kittitas County v. Allphin*, 2 Wn.App. 782, 793, 413 P.3d 22 (2018).

The Appellant argues that the testimony of Junior was "self-serving" and that there was insufficient evidence to support a finding that Jeannie fulfilled her fiduciary duty. However, Junior's testimony was corroborated by probative evidence, including the testimony of Trunk regarding the sale of the Property (*VRP 362:22-362:25; 363:1-363:8; trial exhibit 33*), evidence pertaining to Senior's wrongful actions with regard to the line of equity (*CP 636-641*), and evidence conclusively establishing that Junior had leased out the Property as its owner and evicted tenants when necessary

(VRP 277:1-277:7; VRP 277:1-277:2; 281:7-281:12; VRP 278: 7-25; 279:1-279:9; trial exhibit 20 (Eviction Complaint)). Furthermore, as discussed above, Jeannie took reasonable steps to investigate the creditor's claim and examined and evaluated evidence which, ultimately, the trial court itself found to be credible. The Appellant argues that the documents that Jeannie considered in her decision "had no legal effect on whether Joe L'Amarca, Jr.'s interests had been quitclaimed to Joe L'Amarca, Jr." *Appellant Brief, page 44*. However, the documents reviewed by Jeannie (and, ultimately, the trial court) were probative as to Junior's interests in the Property. Those documents included a contract with Trunk, a declaration by Trunk as to interest in the Property, a deed of trust regarding the line of equity, and the Deed and Assignment.

The Appellant further argues that any reliance upon a telephone conference with Sulkowsky by Jeannie would be insufficient to form a reasonable belief as to the validity of the signature on the Deed and Assignment because "Sulkowsky never stated in that conversation that Joe L'Amarca, Sr. ever represented himself to be Joe L'Amarca, Jr. and or that anyone but Joe L'Amarca, Jr. executed the October 28, 2004 deed." *Appellant Brief, page 44*. However, there was no evidence provided as to what was said in that conversation. With regard to Sulkowsky's in-court statements, Sulkowsky conceded numerous times that he had no personal

recollection of who signed the Deed and Assignment. *VRP 45:18-45:20; 51:8-51:14; 52:14-52:25; 53:1-5; 60:1-60:16; 62:3-62:25; 63:1*. What is known is that Jeannie considered a declaration from Sulkowsky that was not dispositive concerning who signed the Deed and Assignment. *VRP 361:15-361:25; 362:1-362:22*.

The Appellant argues that the evidence concerning Jeannie's investigation did not support the trial court's finding because Jeannie failed to engage a handwriting expert, among other things. *Appellant Brief, page 44*. However, the Appellant retained a handwriting expert, yet that proved to be not helpful to the trier of fact. *CP 514, lines 14-15*. Appellant argues further that Junior's testimony and Jeannie's testimony "cannot be squared" with Sulkowsky's declaration and testimony. *Appellant Brief, page 45*. However, Sulkowsky testified repeatedly that he had no actual knowledge of who signed the Assignment and Deed. *VRP 45:18-45:20; 51:8-51:14; 52:14-52:25; 53:1-5; 60:1-60:16; 62:3-62:25; 63:1*.

Ultimately, the trial court's findings with regard to the veracity of Junior's creditor's claim and Jeannie's fulfillment of her fiduciary duties were supported by substantial evidence in the record.

F. The trial court's decision concerning an award of attorneys' fees was within her discretion.

The trial court awarded attorneys' fees and costs to Junior and Jeannie, against the Appellant pursuant to RCW 11.96A.150 and RCW 4.28.328 (frivolous lien statute). *CP 520-522; CP 523-525*.

RCW 11.96A.150 states:

(1) Either the superior court or any court on appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, 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 (2018).

RCW 11.96A.150 grants courts great discretion in awarding attorneys' fees both at trial and on appeal. *In re Estate of Fitzgerald*, 172 Wn.App. 437, 453, 294 P.3d 720 (2012). See also *In re Estate of Frank*, 146 Wn.App. 309, 327, 189 P.3d 834 (2008). Because of the "almost limitless set of factual circumstances that might arise in a probate proceeding," the legislature "wisely" left the matter of fees to the trial court, directing only that the award be made "as justice may require." *In re Estate*

of Burmeister, 70 Wn.App. 532, 539, 854 P.2d 653 (1993) (quoting former RCW 11.96.140 (1004)).

RCW 11.96A.150(1) allows a court to consider any relevant factor, including whether a case presents novel or unique issues. *In re Guardianship of Lamb*, 173 Wn.2d 173, 198, 265 P.3d 876 (2011). However, it is by no means necessary that a case involve novel or unique issues for there to be an award of attorneys' fees. *Sloan v. Berry*, 189 Wn.App. 368, 379, 358 P.3d 426 (2015). The legislature amended RCW 11.96A.150(1) in 2007 to add the sentence: "[i]n 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." *See Laws of 2007, ch. 475, § 5; see also In re Estate of Evans*, 181 Wn.App. 436, 451, 326 P.3d 755 (2014).

Despite the trial court's broad discretion with regard to an award of fees and costs pursuant to RCW 11.96A.150, the fact that a party prevails in the civil action is a factor that should not be overlooked by the court. In *In re Washington Builders Benefit Trust v. Building Industry Association of Washington et al*, 173 Wn.App. 34, 293 P.3d 1206 (2013), employers brought an action against certain industry associations and their trustees concerning the handling of revenue generated from the operation of a

retrospective rating program for employers' insurance premiums. *In re Washington Builders Benefit Trust v. Building Industry Association of Washington et al.*, 173 Wn.App. 34, 293 P.3d 1206 (2013). Although the employees' claims against the Master Builders Association were ultimately unsuccessful, the trial court denied the Master Builders Association's request for attorneys' fees pursuant to RCW 11.96A.150 because the court found that the employees' claims were not frivolous. *In re Washington Builders Benefit*, 173 Wn.App. at 85, 293 P.3d 1206. The Trustees also requested an award of attorneys' fees pursuant to RCW 11.96A.150, and the trial court denied their request, finding that the litigation raised unique issues. *Id.* The Court of Appeals upheld the trial court's decision concerning the fees to the Master Builders Association and the Trustees. *Id.*

The employees also requested an award of attorneys' fees, and the trial court denied the request. *Id.* However, the appellate court determined that the employees were entitled to attorneys' fees for those claims on which they prevailed at trial. *Id.* at 85-86, 293 P.3d 1206. The appellate court held: "[a]ccordingly, we affirm the trial court's denial of attorney fees and costs to the Master Builders Association and Trustees, and vacate the trial court's denial of Participants' motion for attorney fees on those claims on which they have prevailed." *Id.* at 86, 293 P.3d 1206.

In the instant case, Junior prevailed in his defense against each claim brought against him by the Appellant. The fact that he prevailed would be a significant factor in the trial court's decision with regard to an award of attorneys' fees and costs pursuant to RCW 11.96A.150.

In the trial court's broad discretion with regard to an award of attorneys' fees and costs, the trial court may consider whether the claims filed had merit or were patently frivolous. *See, e.g., In re the Matter of the Estate of Donald C. Muller*, 197 Wn.App. 477, 389 P.3d 604 (2016). In *In re Muller*, the decedent's brother filed a will contest alleging that the will was the product of undue influence. *Id.* at 481, 389 P.3d 604. The trial court tried the will contest and determined that the will was invalid due to exertion of undue influence. *Id.* at 483, 389 P.3d 604. The appellate court awarded the brother his attorneys' fees and costs pursuant to RCW 11.96A.150 because the brother had been forced to defend against a frivolous appeal. *Id.* at 490, 389 P.3d 604. The Court stated:

The Petersons have raised no arguably meritorious issues on appeal, thus eliminating any reasonable possibility of reversal. It would be unfair to require Kriss to bear the costs of defending against such an appeal, and we will not diminish the estate assets further to pay for the litigation. Therefore, we award Kriss his appellate costs and fees, to be paid by the Petersons.

Id. at 490, 389 P.3d 604.

In Portmann v. Herard, Portmann, a beneficiary under the testator's previous will, brought a TEDRA action against the personal representative seeking to enforce a previous will and invalidate inconsistent portions of the subsequent will. Portmann v. Herard, 2 Wn.App. 452, 409 P.3d 1199 (2018). The case involved a narrow issue: whether the beneficiary and decedent entered into an oral agreement to execute mutual wills that became irrevocable when one of them died. Id. at 459, 409 P.3d 1199. The court awarded attorneys' fees and costs to the personal representative:

Portmann challenged a facially valid will based on an allegation that Cross and Morse agreed to execute mutual wills even though oral agreements to devise "are not favored, are regarded with suspicion, and will be enforced only upon the strongest evidence." Portmann presented no such evidence. Accordingly, we exercise our discretion and award attorney fees on appeal to Herard.

Id. at 469, 409 P.3d 1199.

In In re Fitzgerald v. Mountain-West Resources, Inc., 172 Wn.App. 437, 294 P.3d 720 (2012), a creditor filed suit on a claim that was clearly time-barred. In re Fitzgerald v. Mountain-West Resources, Inc., 172 Wn.App. 437, 453, 294 P.3d 720 (2012). The trial court granted the estate an award of attorneys' fees, noting that the estate was required to defend against a meritless claim. Id. As with Portmann v. Herard, In re Fitzgerald v. Mountain-West Resources, Inc., and In re Muller, the case at hand was patently frivolous from the beginning. The Appellant had no admissible

evidence to support her unsubstantiated allegations of fraud and her contention that the Property was an estate asset and conversely, she had ample recorded evidence that such was not the case – including the Real Estate Contract with Trunk and the fulfillment deed conveying the Property to Junior. Additionally, the creditor’s claim included substantial documentation to support Junior’s ownership of the Property, including a declaration from Trunk stating that he intended to sell the Property to Junior. Nonetheless, the Appellant continued with her frivolous claims, resulting in extensive costs to all involved.

The appellate court reviews fee awards under RCW 11.96A.150 for abuse of discretion. *Foster v. Gilliam*, 165 Wn.App. 33, 57, 268 P.3d 945 (2011). A court abuses its discretion “when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons.” *Noble v. Safe Harbor Family Pres. Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009). “A decision is based ‘on untenable grounds’ or made ‘for untenable reasons’ if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

V. RESPONDENT JOSEPH J. L'AMARCA, JR. IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES INCURRED IN THIS APPEAL

The rules of appellate procedure permit an award of attorney's fees to a prevailing respondent in a frivolous appeal. *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691-92, 732 P.2d 510 (1987); RAP 18.9(a). An appeal is frivolous when there are no debatable issues upon which reasonable minds could differ and when the appeal is so totally devoid of merit that there was no reasonable possibility of reversal. *Id.*

The Appellant had no admissible evidence to support her allegations of fraud and her contention that the Property was a probate asset and conversely, she had ample recorded evidence that such was not the case, including the Real Estate Contract with Trunk and the fulfillment deed conveying the property to Junior. Additionally, the creditor's claim included substantial documentation to support Junior's ownership of the Property, including a declaration from Trunk stating that he intended to sell the Property to Junior. Nonetheless, the Appellant brought claims against Junior not once, but twice.

The claims raised in the TEDRA action by the Appellant against Junior and Jeannie L'Amarca were identical to those claims already dismissed by Pierce County Superior Court Judge Jack Nevin. The Appellant then appealed this dismissal (*Teresa L'Amarca, Appellant v.*

Joseph L'Amarca, et al, Respondents, Case No. 50898-2-II), which appeal was subsequently dismissed for mootness. The Appellant should have realized that her claims could not be established through the necessary clear, cogent and convincing evidence. Discovery further disclosed the weakness in her claims. In October, 2017, counsel for Junior deposed Sulkowsky. The deposition made it abundantly clear that Sulkowsky had no recollection whatsoever of the events that transpired with regard to the disputed signature and could only offer information from his calendar. *VRP 37:3-37:15; trial exhibit 3 (January Declaration); VRP 41:22-41:2; VRP 43:16-43:17; VRP 57:21-25; 58:1-58:1; trial exhibit 4 (May Declaration); VRP 58:16-58:19; VRP 59:8-59:10*. Without the recollection of Sulkowsky as to the identity of the person whose signature he notarized, Sulkowsky could not testify credibly that Junior signed the disputed document and the Appellant could not provide clear, cogent and convincing evidence of the alleged fraud. In fact, the trial court ruled that Sulkowsky's testimony was not credible. Yet, despite the deposition testimony of Sulkowsky, the Appellant continued pursuing her claims even to trial, driving up the costs and fees.

The Appellant's appeal is frivolous the alleged errors in her brief and all of her arguments could not possibly have resulted in reversal. In *Stiles v. Kearney, 168 Wn.App. 250, 267-68, 277 P.3d 9 (2012)*, the court

awarded fees for a frivolous appeal where all of the appellant's arguments could not possibly have resulted in a reversal because they either lacked merit, relied on a misunderstanding of the record, required a consideration of evidence outside the record, or were not adequately brief. *Id.* Because the Appellant's arguments, record and briefing are all similarly defective, her appeal is frivolous and justifies an award of fees pursuant to RAP 18.9(a).

VI. CONCLUSION

The Court should uphold the trial court's denial of the Appellant's claims under her TEDRA Petition and uphold the trial court's award of attorneys' fees and costs to Junior and Jeannie L'Amarca based upon its unchallenged findings of fact which are verities on appeal and based upon the substantial evidence supporting the trial court's decisions. The Court should find the trial court's decision in this case to be a proper exercise of the trial court's discretion. The Court should further award Junior his attorneys' fees on appeal pursuant to RAP 18.9 finding that the Appellant's appeal was frivolous.

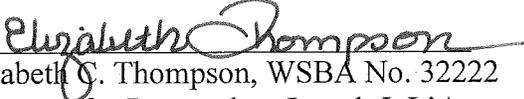
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DATED this 14th day of December, 2018.

Respectfully submitted,
MORTON McGOLDRICK, P.S.

By: 
Elizabeth C. Thompson, WSBA No. 32222
Attorneys for Respondent Joseph J. L'Amarea, Jr.

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

I am employed by the law firm of Morton McGoldrick, P.S.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above entitled action, and competent to be a witness herein.

On, I served in the manner noted the document(s) entitled: on the following person(s):

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MORTON McGOLDRICK, P.S.



Virginia Ales, Paralegal

MORTON MCGOLDRICK

December 14, 2018 - 11:25 AM

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