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Division II
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Court of Appeals No. 52049-4-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

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.

APPELLANT'S REPLY BRIEF

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ARGUMENT IN REPLY

The issues raised by Teresa L'Amarca and, specifically, her allegations against personal representative Jeannie L'Amarca were properly before the trial court because a personal representative may be cited to appear in court whenever a petition from an aggrieved estate party is supported by cause. *In re. Estate of Jones*, 152 Wn2d 1, 9, 93 P3d 147 (2004).

Jeannie's Claim that Linda Kartes and Teresa L'Amarca Colluded Is Irrelevant and Not Supported by the Record

Linda Kartes is the mother of personal representative Jeannie L'Amarca, ("Jeannie"), and petitioner Teresa L'Amarca, ("Teresa"), and Linda appeared in Pierce County Superior Court early in the probate process and, as a *pro se*, petitioned for and received an appointment as the first personal representative of Joseph L'Amarca, Sr.'s, (Joe, Sr.'s) estate. Nevertheless, Jeannie errs in arguing, within her "Statement of Case" that this was an act of "subterfuge." (Jeannie's Resp Brief, page 5). It was, instead, Linda's *pro se* attempt to assist in the administration of Joe, Sr.'s estate, (the "Estate"), when Jeannie did not come forward to do so.

Jeannie's Claim that the Estate Was Without Funds Is Irrelevant and Not Supported by the Record

Jeannie's response brief utilizes many paragraphs to accuse her mother and her sister of various misdeeds which allegedly left the Estate with few

funds by January 2017. (Jeannie's Resp. Brief, page 5).¹ Jeannie mis-cites VRP 372:7-12 for the above proposition and then, without citation, accuses her mother of "depleting substantially all of the estate's cash on-hand." *Id.*

These statements are false. The verbatim transcript at VRP 372:7-12 has nothing to do with any alleged pilfering of the Estate. At VRP 372:7-12, Jeannie testified that she paid money from her own pocket to hire attorneys to file a petition for her to become the personal representative in September 2016. There is no correlation between that testimony and the allegations that her mother and her sister were denuding the Estate.

In addition, Jeannie's trial testimony actually contradicts her claims that the Estate was insufficiently funded to contest Joseph L'Amarca, Jr.'s, ("Joe, Jr.'s"), creditor claim. Jeannie testified in court that when Joe, Jr. made his claim she believed the Estate's largest asset, 3311 Bridgeport Way West, was worth \$200,000 though it had a \$27,000 line of credit secured against it. VRP 375:5-22. Also, the inventory Jeannie filed with the Court on April 19, 2018, approximately 14 months after Joe, Jr. presented his claim, showed the Estate's assets, including Bridgeport, were worth \$312,737.65, plus an unknown amount of funds at HSBC Bank. CP 231 and CP 607-12.

¹ By January of 2017, Jeannie had already been the personal representative for four months. See CP 607-12.

Of the known \$312,737.65 in Estate value, \$11,717.65 was in cash, plus the unknown amounts at HSBC. CP 230-41, esp. 231. As a result, the Estate had significant assets when Jeannie was presented with Joe, Jr.'s creditor claim on February 3, 2017,² but Jeannie never made any attempt to marshal or liquidate the assets either before or after Joe, Jr. presented his claim.³ Therefore, the assertion by Jeannie, at page 1 of her Response Brief, that she should be excused for quitclaiming Bridgeport to Joe, Jr. because failing to do so would "damn" the Estate⁴ is incredulous.

Finally, Jeannie's uncited assertion, at page 8 of her Response brief, that she feared the Estate would be "rendered administratively insolvent" if she opposed Joe, Jr.'s claim cannot be supported by any sober reading of the underlying record or the law. See next section.

The Trial Court Clearly Erred, as a Matter of Law, in Ruling that There Was a Lack of Credible Evidence in the Record to Show that the Grantor, (Joe, Jr.), Received Consideration for Assigning His Bridgeport Interests to the Grantee, (Joe, Sr.), via the October 28, 2004 Deed

The trial court erred, as a matter of law, by holding that there was a lack of credible evidence showing that the grantor, (Joe, Jr.), received consideration from the grantee, (Joe, Sr.), for Joe Jr.'s assignment of his

² CP 230-41 and 627-653.

³ CP 230-41 and 352 and VRP 200:15 – 202:11, 225:18 – 226:2, 226:14-16, 228:1-4, 229:15-23, 230:16-19, 375:5-22, 381:7 – 382:2, and 382:22 – 383:24.

⁴ Jeannie's response brief, page 1

interests in Bridgeport to Joe, Sr. because the October 28, 2004 deed, itself, states that Joe, Jr.'s interests in Bridgeport are being conveyed to Joe, Sr. in exchange for Joe, Sr. assuming Joe, Jr.'s obligations on the 1988 real estate contract between Joe, Jr. and Tony Trunk. CPs 350 and 643.

The Trial Court Clearly Erred, as a Matter of Law, in Ruling that An Absence of Evidence Concerning the Receipt of Consideration by a Grantor is Grounds to Cancel a Grantee's Deed

The trial court erred, as a matter of law, in holding that a notarized and recorded deed does not convey title if a trial court finds there is a lack of credible evidence in the record showing that the grantor, (Joe, Jr.), received consideration because lack of evidence of consideration cannot be utilized to invalidate a recorded deed. *Golle v State Bank of Wilson Creek*, 52 Wn 437, 439-40, 100 P. 964 (1909).

The Trial Court Abused Its Discretion Regarding Its Findings and Conclusions Concerning Jeannie Fulfilling Her Fiduciary Duties and Her Credibility as a Witness Because Jeannie Never Had Any Proof that the 2004 Quitclaim Deed Was a Forgery

Jeannie claimed she relied on items besides Joe, Jr.'s word in deciding to quitclaim 3311 Bridgeport Way West, ("Bridgeport"), to Joe, Jr., but the other items she claims to have relied on, i.e., the "paperwork" from Tony Trunk and a conversation Jeannie claims she overheard between Joe, Jr. and attorney/notary Douglas Sulkosky⁵ do not provide any support for Joe, Jr.'s

⁵ VRP 370:12-17.

claim that a October 28, 2004 deed conveying his interests to Joe, Sr. was a forgery because:

1. the plain language and simultaneous filing of the 2006 deed from Tony Trunk to Joe, Jr. and the 2004 deed from Joe, Jr. to Joe, Sr. clearly show that Tony Trunk was, as of the recording dates of the deeds, off title and Joe, Sr. was on,⁶
2. the only recollection of the conversation between Joe, Jr. and Sulkosky which was admitted into evidence was Sulkosky's and he testified that he told Joe, Jr. he would not do what Joe, Jr. wanted him to do, i.e., deny that Joe, Jr.'s signature was the one on the 2004 deed, VRP 64:8-25, and
3. Tony Trunk testified at trial, and would have told Jeannie if she had asked him, that he had nothing to do with the October 2, 2006 deed after executing it for Joe, Jr.⁷

The above statement, coming from Trunk, would have made Joe, Jr. the most likely person to have subsequently and simultaneously recorded the October 2, 2006 and October 28, 2004 deeds because there was no testimony or statement from Joe, Jr. that he lost the 2006 deed or it was

⁶ The October 2, 2006 deed from Tony Trunk to Joe, Jr., (Trial Exhibit 32, CP 352 and CP 647), was filed at 10:29 A.M. on October 13, 2006 under recording number 200610130377. The October 28, 2004 deed from Joe, Jr. to Joe, Sr., (Trial Exhibit 1, CP 350 and 643-44), was recorded at 10:29 A.M. on October 13, 2006 under recording number 200610130378. A scrivener's error at page 8 of Jeannie's brief states that Tony Trunk delivered a "2004 Warranty Deed" to Joe, Jr. The deed from Tony Trunk to Joe, Jr. is dated September 29, 2006 and notarized on October 2, 2006. See Trial Exhibit 32, CPs 352 and 647 and VRP 173:19-21.

⁷ The date next to Tony Trunk's signature on the Trunk to Joe, Jr. deed is actually September 29, 2006, but the notary acknowledgement on the Trunk deed is dated October 2, 2006..

stolen or that he asked Joe, Sr. to take it to the Auditor's office and record it. Therefore, the only reasonable title conclusion Jeannie could have made, based on the evidence she had before granting Joe, Jr.'s claim, was that Joe, Jr., himself, simultaneously recorded both deeds or they were simultaneously recorded at his direction. As a result, the 2004 deed from Joe, Jr. to Joe, Sr. was accurate and valid.

Jeannie also errs in stating, at page 8 of her Response, without any legal or factual citation, that there is no evidence to contradict her position that title to the property vested in Joe, Jr.

Jeannie is clearly mistaken about this, as was the trial court in ruling that no asset of the Estate was transferred by Jeannie, because:

1. it is well-established that a person can convey any interests in real property he or she has, but only the interests he or she has, see RCW 64.04.070,
2. "[e]very conveyance of real estate or any interest therein and every contract creating or evidencing any encumbrance upon real estate shall be by deed ... and all such assignments or transfers ... are ... legal and valid," RCW 64.04.010,
3. title to an estate's real property vests in the devisee, i.e. the person to whom real estate is left, upon the devisor's death, RCW 11.04.250,
4. a notary acknowledgement is prima facie evidence of the facts therein, RCW 64.08.050,
5. the standard of review for cancelling a deed is clear, unequivocal, and convincing evidence that the deed is illegal or

invalid from the person seeking to cancel it, *Golle v State Bank of Wilson Creek*, 52 Wn 437, 439, 100 P. 964 (1909), citing *Sahlin v Gregson*, 46 Wn. 452, 453, 90 Pac. 592, (1907),⁸ and

6. The ability to rely upon any signature which is acknowledged by a notary is considered sacrosanct. *Klem v Washington Mutual Bank*, 176 Wn2d 771, 792-93, 295 P3d 1179 (2013), (declined to extend, on different grounds by *Deegan v Windermere Real Estate*, 176 Wn2d 771, 889, fn 47, 295 P3d 1179 (2017)). See below.

A signed notarization is the ultimate assurance upon which the whole world is entitled to rely that the proper person signed a document on the stated day and place. Local, interstate, and international transactions involving individuals, banks, and corporations proceed smoothly because all may rely upon the sanctity of the notary's seal. This court does not take lightly the importance of a notary's obligation to verify the signor's identity and the date of signing by having the signature performed in the notary's presence. *Werner v. Werner*, 84 Wash.2d 360, 526 P.2d 370 (1974). As amicus Washington State Bar Association notes, "The proper functioning of the legal system depends on the honesty of notaries who are entrusted to verify the signing of legally significant documents." Amicus Br. of WSBA at 1.⁹

[In fact,] it is a crime in both Washington and California for a notary to falsely notarize a document.¹⁰

In Washington:

⁸ In *Sahlin v Gregson*, the Washington Supreme Court reversed a trial court ruling that the underlying written document was not a mortgage, as respondent Sahlin urged, but rather a deed conveying respondent Sahlin's interest. *Id.* at 453-56. In so doing, the Washington Supreme Court ruled that "... we are constrained to hold that the respondents ... failed to show that the deed is other than it purports on its face to be." *Sahlin* at 456.

⁹ *Klem* at 792-93.

¹⁰ *Id.*

Official misconduct—Penalty

(1) A notary public commits official misconduct when he or she signs a certificate evidencing a notarial act, knowing that the contents of the certificate are false. Official misconduct also constitutes unprofessional conduct for which disciplinary action may be taken.

(2) A notary public who commits an act of official misconduct shall be guilty of a gross misdemeanor.

RCW 42.44.160.¹¹

Therefore, the proof in this case showed that while Joe, Jr. obtained Bridgeport in 1988 subject to his then-obligation to pay Tony Trunk under the 1988 real estate contract,¹² he later quitclaimed his interests to Joe, Sr. in the October 28, 2004 deed. As a result, once the October 28, 2004 deed was executed by Joe, Jr., his interests in Bridgeport went to Joe, Sr. who then held Bridgeport's title subject to the 1988 obligations to Trunk. Trial Exhibit 1, CP 350 and 643-44.

In fact, this is directly expressed in the October 28, 2004 deed, itself. It states Joe, Jr. is “assign[ing], transfer[ing], and set[ting] over to grantee that certain real estate contract ... between Tony Trunk ... and Joseph J. L’Amarca, Jr. as purchaser for the sale a[n]d purchase of the above-

¹¹ RCW 42.44.160 was part of the original citation in *Klem, supra*, but RCW 42.44.160 was repealed by 2017 c 281 § 34, effective July 1, 2018. See RCW Ch. 42.45 for Revised Uniform Law on Notarial Acts.

¹² Trial Exhibit 19, CP 351 and 633-34.

described real estate. The grantee hereby assumes and agrees to fulfill the conditions of said real estate contract.” CPs 350 and 643.

Those remaining obligations to Trunk were fulfilled on October 2, 2006, so Joe Sr., at that point, had exclusive title as against Joe, Jr. and Tony Trunk.¹³ As a result, once the October 28, 2004 deed from Joe, Jr. to Joe, Sr. and the October 2, 2006 deed from Tony Trunk to Joe, Jr. were recorded, all of the documentary evidence that Jeannie could have reviewed clearly showed Joe, Sr. was the only title-holder of record.

Jeannie Never Came Close to Fulfilling Her Fiduciary Duty

Page 9 of Jeannie’s Response Brief and page 13 of Joe, Jr.’s Response Brief express the essence of why Jeannie failed in her duties as personal representative. At Jeannie’s page 9, it states: “Jeannie determined that [Bridgeport] was probably not an estate asset and if litigation was pursued [it] could be confirmed to belong to [Joe, Jr.]” That statement begs the question of what Jeannie and the trial court did to determine whether Bridgeport was an Estate asset.

The record shows the only action Jeannie took was to trust Joe, Jr. Such a standard, if upheld, would be akin to the Court ruling there is no

¹³ Trunk’s October 2, 2006 deed acknowledged that he had no remaining interests in Bridgeport because he was “convey[ing] and warrant[ing]” his interests in Bridgeport to Joe, Jr. “for and in consideration of fulfillment of [the 1988] Real Estate Contract.” Trial Exhibit 32, CP 352 and 647.

fiduciary standard for a personal representative because any personal representative could transfer any portion of any estate to anyone, so long as he/she claimed a subjective belief in the honesty of the claimant. This clearly would be improper.

The ethical and fiduciary duty standards for personal representatives remain the same regardless of whether they are administering an intervention estate or a non-intervention estate. *In re Estate of Jones*, 152 Wn2d 1, 11, 21, 93 P3d 147 (2004). Therefore, Jeannie and Joe, Jr.'s arguments that Jeannie is excused because she was administering a non-intervention estate are irrelevant.

In Jeannie and Joe, Jr.'s response briefing they presume, as the trial court did, that Jeannie, as the personal representative, had no burden to hold Joe, Jr. to any standard in showing he could prove fraud by Joe, Sr. in creating the October 28, 2004 deed. This is clearly an erroneous interpretation of the law. See *Golle v State Bank of Wilson Creek, supra*, 52 Wn 437, 439-40, 100 P. 964 (1909), (the standard of review for cancelling a deed is clear, unequivocal, and convincing evidence that the deed is illegal or invalid from the person seeking to cancel it.).

Jeannie and Joe, Jr. also presume, as the trial court did, that the matter for trial court review was whether Teresa could prove Joe, Jr. perpetrated a fraud. This is an erroneous interpretation of the law. The

matter for the trial court was, instead, whether Joe, Jr. had shown Jeannie clear, unequivocal, and convincing evidence that the October 28, 2004 deed was illegal or invalid, see *Golle, supra*, because Jeannie's act in cancelling the deed was not a judicial act entitled to deference on review. It was an act which required Jeannie to show the trial court, on review, that performing it was compelled by clear, unequivocal, and convincing evidence from Joe, Jr. which Jeannie received when evaluating his claim, and that her decision, as a matter of law, was the correct one. Therefore, the trial court plainly erred in placing the burden of proof on Teresa and then ruling that Jeannie's conduct was proper.

It was an egregious error by the trial court because the trial court placed burdens without considering Washington real property conveyance and estate law concerning what proof is necessary to cancel a deed, the duties a personal representative owes to an estate's devisees and legatees, and the standard that Jeannie, based on her duties to the Estate's devisees and legatees, needed to apply to Joe, Jr's claim.

Those authorities cited at pages 7-9 of this brief state what proof is necessary to cancel a deed and the standard that Jeannie, based on her duties to the Estate's devisees and legatees, needed to apply to Joe, Jr's claim. They apply here and Teresa urges the Court to rely on them, but their lengthy words will not be needlessly repeated on this page, but it should be

noted that, if the standard is otherwise, “deeds and other written instruments have lost their chief virtue,” *Golle* at 439, citing *Sahlin* at 453. Therefore, in the absence of clear, unequivocal, and convincing evidence to the contrary, a deed is what “it purports on its face to be.” *Sahlin* at 456.

Finally, the presumptive validity of a deed is so great that all those on notice of a deed must treat the property as if the grantee has good title even if the deed was never recorded, *Stoebuck*, Wa. Prac. 17, § 7.4, (2018) and *Mann v Young*, 1 Wn Terr. 454, 463 (1874), and, if recorded, a deed is considered legal and valid even if the deed is unexecuted or unacknowledged. RCW 65.08.030.

Jeannie’s Ignorance of Real Estate Conveyancing Law and the Duties Required of a Personal Representative are Not a Legal Excuse for Failing to Fulfill Such Duties

The 1988 real estate contract between Tony Trunk and Joe, Jr., as well as the October 2, 2006 deed from Trunk acknowledging the extinguishing of Trunk’s interests in Bridgeport, showed Joe, Jr.’s and Tony Trunk’s interests in Bridgeport were passed to Joe, Sr. through the October 28, 2004 deed because, under RCW 64.04.070, whatever conditional interest Joe, Jr. had at that time passed to Joe, Sr. In addition, as a matter of law, any additional interests of Trunk that passed to Joe, Jr. through the October 2, 2006 deed also passed to Joe, Sr. as what it commonly referred to as “after-

acquired title.” RCW 64.04.070 and Stoebuck, 17 Wa. Prac., Vol. 17, § 7.8 (2018).

Having adequate knowledge of the above-mentioned principles of real estate conveyance and estate law was Jeannie’s burden as personal representative because a “personal representative stands in a fiduciary relationship to those beneficially interested in the estate.” *In re Estate of Larson*, 103 Wn.2d 517, 521, 694 P.2d 1051 (1985).¹⁴ As such, he or she is obligated to “exercise the utmost good faith and diligence in administering the estate in the best interests of the heirs,”¹⁵ administer the estate solely in the interest of the beneficiaries, and uphold his or her duty of loyalty to the beneficiaries. *In re Estate of Jones*, 152 Wn.2d at 21.

In addition, a personal representative acts in a trust capacity. *In re Estate of Johnson*, 187 Wn 552, 554, 60 P2d 271 (1936).¹⁶ In such a capacity, if something so minor as the valuation of a piano is questionable, it may indicate a breach of that trust, *In re Estate of Jones*, 152 Wn2d 1, 16-17, 93 P3d 147 (2004),¹⁷ and where no action is taken to perform one of his/her fiduciary duties, that trustee definitely breaches his/her fiduciary

¹⁴ Superceded on different grounds by statute according to *In re Estate of Bockwoldt*, 814 NW2d 215, 226 (2012).

¹⁵ *In re Estate of Larson*, at 521 and *In re Estate of Johnson* at 554.

¹⁶ Distinguished on other grounds by *Guardianship of Robinson*, 9 Wn2d 525, 539, 115 P2d 734 (1941).

¹⁷ Distinguished on other grounds by *In re Estate of Lowe*, 191 Wn App 216, 229, 361 P3d 789 (2015).

duty to act as a “prudent manager.” *Allard v Pac. Nat. Bank*, 99 Wn2d 394, 406, 663 P2d 104 (1983).¹⁸

The *Allard* court ruled that it was abuse of discretion not to award the beneficiaries in *Allard* their legal fees and costs against the trustee because the trustee engaged in “inexcusable conduct” constituting fiduciary breach when it failed to make efforts to get the best possible price for the sale of trust real property by failing to offer the property for sale on the open market or obtain an independent outside appraisal of the property to determine fair market value. *Id.* at 405-06. The import of *Allard*’s ruling is that a trustee, or one with trustee-type duties, must have some knowledge of what the beneficiaries are entitled to before he/she/it can dispose of a large part of the estate. See *Allard* at 405-08. Therefore, it must surely be a breach, under *Allard*, for a fiduciary like Jeannie to quitclaim real property titled in the name of the estate’s decedent to a third party without any knowledge of what the legal standard is for cancelling the existing recorded deed or to quitclaim real property to a third party transferee without any knowledge that a prerequisite for the quitclaim is requiring the third party transferee to provide proof of superior title by clear, unequivocal, and convincing evidence. See *Golle, supra*.

¹⁸ Superseded on different grounds by statute, *Eisenbach v Schneider*, 140 WnApp 641, 660, fn 53, 166 P3d 858 (Div 1, 2007).

The duty for a fiduciary to investigate, inquire, and have knowledge consistent with his/her position was, post-*Allard*, starkly emphasized in *Senn v Northwest Underwriters*.¹⁹ In *Senn*, the Court of Appeals affirmed the trial court's summary judgment ruling against a director of Consumers Indemnity Company, (Mary Ann Cimoch), by holding her liable for breach of fiduciary duty through nonfeasance and holding her nonfeasance to be the proximate cause of all of the losses of Consumer Indemnity's beneficiaries when their payments were improperly diverted by a different director of Consumers Indemnity. *Senn v Northwest Underwriters, Inc.*, 74 WnApp 408, 410, 414-19, 875 P2d 637 (Div 1 1994).

Specifically, the *Senn* court ruled that there could be no genuine issue of material fact concerning Mary Ann Cimoch's liability even if she was unaware of the diversion and did not participate in the formation or implementation of the system and entity where the funds in trust were channeled, *Id.*, and, instead, was liable "notwithstanding her lack of knowledge of the diversion ...," *Id.* at 414, because:

[Mary Ann] Cimoch's failure to be involved in and familiarize herself with the business of Consumers [Indemnity Company], rather than insulating her from liability, establishes a breach of her statutory fiduciary duty as a director of Consumers under the statute." *Senn* at 414-419, esp. 417, citing RCW 48.05.370.

¹⁹ *Senn v Northwest Underwriters, Inc.*, 74 WnApp 408, 875 P2d 637 (Div 1 1994)

Senn's interpretation of the actual duties under the particular statute at issue in *Senn* is suitable for determining that an estate's personal representative has an actual duty to have sufficient knowledge of the matter he/she is to administer because the director statute at issue in *Senn* is a near replica of what Washington's common law states a personal representative's fiduciary duty is, i.e., to discharge the duty of one's respective position in good faith, and with that diligence, care and skill which ordinary prudent persons would exercise under similar circumstances in like positions. Cf. RCW 48.05.370 to *Allard* at 406, *Estate of Jones* at 16-17 and 21, *Estate of Johnson* at 554, and *Estate of Larson* at 521.

Requiring Jeannie to have relevant legal knowledge concerning a recorded and acknowledged deed's effect and what burden needed to be met before such a deed can be cancelled should have been imposed on Jeannie by the trial court, as well as the burden of actually interpreting, in a sober, knowledgeable, and objective fashion, the declaration, deposition, and trial testimony of Sulkosky, the 1988 Tony Trunk / Joe, Jr. real estate contract, the 2003 HELOC, the October 2, 2006 Tony Trunk deed, and the October 28, 2004 deed from Joe, Jr. assigning Joe, Jr.'s interests to Joe, Sr.

Applying such a standard, i.e., one akin to *Senn's*, would not be novel. In its ruling, the *Senn* Court adopted New Jersey case law, under a similar

statute, that noted other jurisdictions had imposed similar duties under common law principles or statutory provisions prescribing that:

[b]ecause directors are bound to exercise ordinary care, they cannot set up as a defense lack of the knowledge needed to exercise the requisite degree of care. If one 'feels that he has not had sufficient business experience to qualify him to perform the duties of a director, he should either acquire the knowledge by inquiry, or refuse to act.' The logic of this proposition is irrefutable. One cannot discharge a duty by remaining ignorant of what that duty entails. Just as ignorance of the law is no excuse for the violation of a law, ignorance of the affairs of a business to which one owes a duty of diligence, care and skill does not excuse a director from liability for her colleagues' fraud or malfeasance. *Senn* at 416, (internal citations omitted).

It is instructive that the *Senn* Court, in finding proximate cause between Mary Ann Cimoch's nonfeasance and the beneficiaries' losses, applied a similar rationale, to wit, that: "Had Cimoch been even minimally involved in Consumers [Indemnity's] affairs, she would have been on inquiry notice that funds were being diverted." *Senn* at 418-19.

Reliance or Non-Reliance on Advice from Counsel is Not a Defense for Jeannie.

As conceded by Jeannie's attorneys at trial, a personal representative is not shielded from liability, and cannot defend against liability, by stating he/she relied on the advice of his/her attorneys. VRP 348:2-19 and 348:20-23.

The Matter Should Be Remanded to the Trial Court with Directions for the Imposition of a Constructive Trust

The Court of Appeals has, just as the trial court had, ample authority to impose a constructive trust and place Bridgeport within it because the record clearly shows breaches of fiduciary duty and an absence of any valid proof from Joe, Jr. concerning his title claim, thus providing sufficient grounds for the appellate court to intervene. *Estate of Jones* at 21. Therefore the Court of Appeals should remand this case with directions to impose such a constructive trust because judicial intervention is the only way the Estate property can be preserved so it can be distributed to the appropriate devisees, i.e., Jeannie and Teresa.

The Trial Court Abused Its Discretion and Erred in Completely Disregarding Unrebutted Testimony from Forrest

The trial court listed no reason why it did not find Teresa's handwriting expert, Brian Forrest, credible. As such, its decision cannot be regarded as anything but arbitrary because an expert must, as per ER 702 and 703, be operating within his/her sphere and giving testimony on topics which are outside of the trial court's area of expertise. As a result, there is no rational reason why a trial court, without explanation, would, or should, disregard an expert's testimony. See *In re Custody of Stell*, 56 Wn App 356, 370, 783 P2d 615 (Div 1, 1989), (distinguished on different grounds by *Matter of Custody of L.M.S.*, 187 Wn2d 567, 577-82, 387 P3d 707 (2017)).

Jeannie uses pages 14-15 of her Response Brief and Joe, Jr. uses 9-11 of his Response Brief to provide conclusions, rather than facts,

concerning Brian Forrest. These do not withstand scrutiny when viewed against the actual testimony from, and exhibits utilized by, Forrest. This testimony is detailed in Teresa's Initial Brief and will not be laboriously repeated here. The record, however, clearly establishes, that Forrest did not, as Jeannie states, at pages 14-15 of her Response Brief, rely "solely on a single full signature sample." As Brian Forrest testified at trial, his opinion was based on Joe, Jr.'s full signatures on certified copies of 13 documents that were filed with either the court, the auditor's office, or the assessor's office, including:

1. Trial Exh 1, CP 350 and 643, (Oct. 28, 2004 deed),
2. Trial Exhs 7 and 34, CP 350-51 and 627-53, and VRP 85, 199, (Feb. 3, 2017 creditor claim against Joe, Sr.'s estate);
3. Trial Exhs 10 and 31, CP 351-52 and 653 and VRP 85 and 166 (Joe, Jr.'s current driver's license);
4. Trial Exh 30, CP 352 and VRP 166, (Nov. 16, 2013 quit claim deed bearing Joe, Jr.'s signature);
5. Trial Exh 29, CP 351 and VRP 166, (Mar. 7, 2012 warranty deed bearing Joe, Jr.'s signature);
6. Trial Exh 28, CP 351 and VRP 166, (May 20, 2008 warranty deed bearing Joe, Jr.'s signature);
7. Trial Exhs 16 and 27, CP 351 and VRP 86, 166, (July 11, 2008 deed of trust bearing Joe, Jr.'s signature), (trial exhibits 16 and 27);
8. Trial Exh 26, CP 351 and VRP 166, (June 30, 2008 deed of trust bearing Joe, Jr.'s signature);

9. Trial Exhs 8 and 25, CP 350-51 and VRP 85, 166, (Aug. 26, 2004 excise tax affidavit bearing Joe, Jr.'s signature;
10. Trial Exhs 20-23, CP 351 and VRP 166, (1990 eviction complt., decl. of service, lease agmt., and default judgments;
11. Trial Exh 12, CP 351 and VRP 86, (uncertified copy of 1990 eviction compl.); and
12. Trial Exh 15, CP 351 and VRP 86, (Mar. 28, 2017 agmt. settling creditor claim.

Jeannie and Joe, Jr.'s Arguments Regarding Sulkosky's Testimony Are Not Supported by the Record and Should Be Disregarded

Jeannie, at pages 10-11 of her Response Brief, and Joe, Jr. at page 9 of his Response Brief miscite the findings of the trial court concerning attorney/notary Douglas Sulkosky. The trial court did not find that Sulkosky was "unreliable" as Jeannie and Joe, Jr. allege. It correctly found that: "Attorney Douglas Sulkosky notarized the signature on the [October 28, 2004] assignment." CP 514, ll. 8-9."

Both Response Briefs infer that Sulkosky could not recall the critical events of the October 28, 2004 notarization of Joe, Jr's signature. As stated and argued in Teresa's initial brief, however, Sulkosky's testimony was that he knew the signer of the October 28, 2004 deed was Joe, Jr. based on his practice of always making persons unknown to him present identification before notarizing their signatures, his legal duty to ascertain the identity of any unknown person before notarizing his/her signature, the printed name

of “Joseph J. L’Amarca Jr.” on the 2004 deed, itself, the age he remembered the person then-appearing before him to be, and the use of his 2004 computer schedule and knowledge of what entries indicated it was Joe, Jr., as opposed to Joe, Sr., who appeared in his office on October 28, 2004.²⁰ Therefore, while Sulkosky testified, as most people would, that he could not specifically remember each detail of a notarization event that occurred 13-14 years before, it is misleading to state or imply that he could not recall the critical events of that day.

It is also erroneous for each of Jeannie and Joe, Jr. to state that Sulkosky did not produce his calendar “though he had been asked to do so.” Joe, Jr. cites to Sulkosky’s testimony for that proposition, but Sulkosky’s testimony actually refutes that proposition if one reads it in its entirety. VRP 59:8-25.

Q Have you produced your calendar with these notations [of meetings with Joe, Jr. and Joe, Sr.] on it?

A No.

Q Is there a reason why you haven’t produced the calendar with the notations of these meetings?

A. **Nobody has asked me.**

²⁰ VRP 31:14-21, 32:16 – 33:1, 33:15 – 34:7, 34:15 – 36:17, 36:10-17, 37:2 – 38:16, 39:7-19, 44:3-18, 45:4-12, 48:7 – 49:10, 53:10-24, 54:13 – 56:22, 59:2-7, 66:14 – 67:6, and 68:9-15.

Q Could you look at your deposition, ... please? You'll notice the question I asked was: Do you still have the notes? Are these notations made in a physical calendar?

You responded: It's on my amicus.

And I said; are you able to print these out?

And you said no. Isn't that correct?

A That's correct.

Q So it's not that nobody asked you about the calendar, it's that you said that you couldn't print them out?

A **That's correct. And I didn't say nobody asked me about them, I said nobody requested them.** VRP 59:8-25.

Jeannie and Joe, Jr.'s Other Factual and Legal Arguments Are Not Supported by the Record

Jeannie, at page 12 of her Response Brief, and Joe, Jr., at page 6 of his Response Brief, state that incontrovertible evidence was presented at the TEDRA hearing that Joe, Sr. lived at Bridgeport from 1988 until his death in 2016. Jeannie and Joe, Jr. are mistaken.

Unrebutted evidence was presented at the hearing that Joe, Sr. lived at Bridgeport from 1993 until his death in 2016. Also, Teresa did not, at trial or in her initial brief, ever argue that Joe, Jr. did not rent Bridgeport to third parties before 1993. In fact, Teresa was the party who offered the pre-1993 eviction pleadings and lease agreement into evidence..

Joe, Jr.'s Response Brief, at page 7 and citing CP 636-41, also is mistaken in alleging that Joe, Sr. "falsely represent[ed] to Washington

Mutual Bank in applying for the 2003 home equity line of credit, (the “HELOC”), that Trunk was under contract to sell [Bridgeport] to [Joe, Sr.]” There is no mention of Trunk or the 1988 real estate contract anywhere within the HELOC application. CP 636-41.

In addition, both Jeannie and Joe, Jr.’s Response Briefs use a figure of \$92,450 when speaking about the HELOC. The amount actually owed was between \$27,000 and \$28,000 as is conceded at page 12 of Joe, Jr.’s Brief.

Throughout Jeannie and Joe, Jr.’s Briefs they also refer to testimony by Joe, Jr. as representing undisputable facts about Joe, Sr.’s acts or Joe, Jr.’s ignorance of them. The Briefs forget that Joe, Sr., being dead since 2016, could not offer any testimony in rebuttal and that Joe, Jr.’s allegations of ignorance are belied by the simultaneous filing of the 2006 deed quitclaiming Tony Trunk’s interest in Bridgeport, to Joe, Jr.²¹ and the 2004 deed assigning Joe, Jr.’s interest in Bridgeport to Joe, Sr.,²² as well as the uncontradicted evidence that Joe, Sr.:

1. resided and remained in exclusive possession of Bridgeport for 22 ½ years before his death in 2016,²³
2. made the payments on Joe, Jr.’s real estate contract to Tony Trunk, VRP 275:14 – 276:7, and

²¹ CP 352 and 647.

²² CP 350 and 643-44.

²³ CP 9 and 607 and VRP 183:17 – 187:20-24, 247:22 – 248:2, 249:24 – 250:15, 256:15 – 257:10, 275:14-16, 276:8-13, and 284:10-17.

3. made all of the property tax payments and controlled who else lived at Bridgeport without any interference from Joe, Jr. who admitted he did not consider Joe, Sr. to be his tenant.²⁴

Finally, much is made of the fact that Joe, Sr. obtained the HELOC. This is a distraction. Teresa conceded at, and prior to, trial, that the HELOC is a debt of the Estate, so how and why the HELOC was obtained is irrelevant to whether Joe, Jr.'s interests were assigned to Joe, Sr..

Jeannie goes on, at pages 13-14 of her Response Brief, to, again, present her conclusions about what she believes witness Gregory Marks' testimony means, but her conclusions are not consistent with Marks' actual testimony. That testimony was detailed in Teresa's initial brief. At best, it was ambiguous about whether Joe, Sr. ever identified himself as Joe, Jr.

The Trial Court Fee Award Against Teresa Should Be Reversed and Fees Should Be Ordered in Favor of Teresa

A trial court's award of fees in a probate case is reviewed for abuse of discretion, but the record before the appellate court is the same as the record before the trial court, so the appellate court is in the same position as the trial court in determining their reasonableness. *Estate of Larson* at 521-22.

Where litigation is necessitated by the inexcusable conduct of a trustee, the trustee must pay those expenses. *Allard* at 406-08. As such, under RCW

²⁴ VRP 304:2-6, 305:13-17, 305:20 – 306:6, and 314:21 – 316:5.

11.68.070, attorney's fees and costs may be awarded to petitioners and assessed against the personal representative individually, including those fees and costs incurred by petitioners on appeal. *Estate of Jones* at 20-21, citing *Allard v Pac. Nat. Bank*, 99 Wn2d 394, 407-08, 663 P2d 104 (1983).

Under the above criteria, Teresa, not Jeannie and Joe, Jr., should have been awarded attorney's fees and costs at the trial court level and now on appeal because the evidence and argument brought forward by Teresa will benefit the Estate by putting wrongfully quitclaimed property back into the Estate and showing that Joe, Jr. never had a claim supported by the *Golle* standard of clear, unequivocal, and convincing evidence.

In addition, Teresa's efforts show that Jeannie never bothered to check into whether Joe, Jr. had any proof at all and the trial court, in applying its incorrect understanding of the applicable law, inadvertently helped deprive the Estate of an asset that properly belongs in the Estate. Therefore, the litigation Teresa has engaged in is indispensable to the proper administration of the Estate and, as such, her fees and costs must be paid by Jeannie and Joe, Jr. See *Allard* at 407.

Respectfully submitted this 16th day of January, 2019.



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CERTIFICATE OF SERVICE

The undersigned does hereby declare that on January 16, 2019, the undersigned delivered a copy of APPELLANT'S REPLY BRIEF filed in the above-entitled case to the following persons:

VIA WASHINGTON APPELLATE COURTS FILING PORTAL

Clerk, Washington State Court of Appeals, Division II
950 Broadway, Suite 300 MS TB 06
Tacoma, WA 98402-4427

DATED this 16th day of January, 2019

By: /s/ Sharon Rheinschild
Printed Name: Sharon Rheinschild

LUCE & ASSOCIATES, PS

January 16, 2019 - 12:32 PM

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