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DIVISION III
STATE OF WASHINGTON
By _____

NO. 300081

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In Re Estates of

HARVEY L. JONES and
MILDRED L. JONES,

Deceased

TERESA ENGBRETSON and MARY ANN SEALOCK, heirs of
Harvey L. Jones and Mildred L. Jones,

Appellants

vs.

WILL L. JONES, personal representative of the estates of Harvey
L. Jones and Mildred L. Jones,

Respondent.

BRIEF OF APPELLANT

MINNICK • HAYNER, P.S.

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I. ASSIGNMENTS OF ERROR

A. The trial court erred in finding that Will Jones and Dennis Jones were not in a confidential relationship with their mother and did not exert undue influence on her when they had her sign the subject documents in 2003.

B. The trial court erred when it granted the motion for summary judgment re: rescission filed by personal representative Will Jones.

1. The issue of rescission was previously argued in a motion for summary judgment filed by personal representative Will Jones. The court denied the motion.

2. Teresa Engbretson and Mary Ann Sealock have a right to seek rescission of the subject documents. Judge Pro Tem Peters so stated.

3. Teresa Engbretson and Mary Ann Sealock acted timely to seek rescission; their right to seek rescission is not time barred.

C. The trial court erred when it found that there were no genuine issues regarding the five “material facts” concerning which personal representative Will Jones said there were no disputes:

1. Teresa Engbretson and Mary Ann Sealock were parties to the 2003 subject documents/agreements.

2. It is not known/established that Will Jones and Dennis Jones made all payments as required. Teresa Engbretson and Mary Ann Sealock did complain, question and make objection once they found out about the 2003 subject documents.

3. It is not known/established what "significant capital improvements" Will Jones and Dennis Jones made to land owned by their parents.

4. Teresa Engbretson and Mary Ann Sealock sought to rescind the 2003 subject documents prior to January 14, 2010. Moreover, their TEDRA petition was timely filed.

5. Teresa Engbretson and Mary Ann Sealock want to restore the estates and parties to the position they were in before execution of the 2003 subject documents.

D. Teresa Engbretson and Mary Ann Sealock request and are entitled to an award of attorney fees.

II. STATEMENT OF THE CASE

A. Factual Background

Harvey Jones and Mildred Jones had four children: Will Jones, Dennis Jones, Teresa Engbretson and Mary Ann Sealock.

C.P. 332. They were farmers in Yakima County, near Zillah. C.P. 48. They owned 178 acres of orchard and crop land. C.P. 332. They owned 139 of 205 shares of Harvey L. Jones Farms, Inc. C.P. 304. The corporation owned 54 acres of orchard and crop land, also near Zillah. C.P. 333.

Harvey L. Jones Farms, Inc. was operated by Harvey Jones and his sons Will and Dennis. C.P. 267, 283. Will Jones and Dennis Jones each also owned orchard and farm land that was farmed as/by Harvey L. Jones Farms, Inc. (together with the land owned by Harvey and Mildred and the land owned by the corporation). C.P. 332-33.

Harvey Jones and Mildred Jones had reciprocal wills. C.P. 48, 304, 361-66. On the first death, all property owned by the decedent was to go to the surviving spouse, most to be put into trust for the benefit of the surviving spouse, who was named as the trustee of the trust. C.P. 304, 361-62, 364-65. On the second death, both wills provided that the estate would go to the four children "share and share alike." C.P. 48, 304.

Harvey Jones died May 24, 2003. C.P. 48, 304. His will was not admitted to probate until January 16, 2004. C.P. 81. The trust that his will directed to be established for the benefit of his

wife, Mildred, with her as trustee, was never established. C.P. 50, 305.

On February 21, 2003, three months before Harvey died, he, Mildred, Will Jones and his wife, and Dennis Jones and his wife signed a Farming Agreement. C.P. 275. At that time, Harvey Jones Farms, Inc. owed money to MetLife and FSA. C.P. 284, 308-09. Both loans were made to get money for the farm corporation to continue to operate. C.P. 267-268. Harvey, Mildred, Will and his wife, and Dennis and his wife were all personally liable on the debts. C.P. 309. None of them has ever made any payment on the debts using his/her/their own personal funds. All debt payments have been made by the farm corporation. C.P. 309. The Farming Agreement, in relevant part, states:

That all parties will continue to own and/or lease their agricultural real and personal property (land, equipment, crops and receivables thereof) to Harvey L. Jones Farms, Inc. until all indebtedness is retired.

C.P. 275.

On August 4, 2003, before the Harvey Jones will was admitted to probate and before the Harvey L. Jones trust was established (it has never been established), Will and Dennis, with the assistance of their financial advisor Eric Weinheimer, had their

mother, Mildred Jones, sign multiple documents. C.P. 268-70. These documents, referred to herein as the "subject documents," included: (1) Agreement Between Shareholders for Transfer of Stock by Gift (C.P. 367-69); (2) Right of First Refusal (C.P. 230-34); and (3) Agricultural Property Lease-Option (C.P. 236-51).

All three documents were signed by Mildred Jones twice, once in her individual capacity and once as the "Trustee of the Testamentary Trust of Harvey L. Jones." C. P. 369, 232,249. When the subject documents were signed, there was no Harvey L. Jones Testamentary Trust and Mildred was not the Trustee thereof (she never became such). C.P. 50, 305.

The Harvey L. Jones will was admitted to probate on January 16, 2004. C.P. 81. Mildred was appointed as the personal representative. C.P. 282. Mildred died July 17, 2007. C.P. 282. Will Jones was appointed as the personal representative of her estate. C.P. 282. He was also appointed as successor personal representative of the Harvey Jones estate. C.P. 282.

Will Jones, as personal representative of the estates, hired an appraiser, Richard Pulis, to appraise the 178 acres of farm land owned by Harvey and Mildred Jones. He appraised the property as of May 24, 2003 (his appraisal report is dated November 8, 2008).

He valued the property at \$1,050,000. C.P. 305, 335, 338. In the Agricultural Property Lease-Option that Will and Dennis had their mother sign on August 4, 2003, she agreed to lease the 178 acres to Will and Dennis personally for \$50,000 per year (\$4,166 per month) for 16 years (a total of \$800,000). C.P. 237. If Will and Dennis elected to buy the property (i.e., exercise their option), the purchase price was \$800,000, and “The base lease payments of \$50,000 per year paid by Lessee under the Lease will be applied as a reduction to the Purchase Price on closing.” C.P. 247.

B. Procedural History

On February 21, 2003, Harvey Jones, Mildred Jones, Dennis Jones and his wife, and Will Jones and his wife signed the Harvey L. Jones Farms, Inc. Farming Agreement. C.P. 193-94, 275-76.

On May 24, 2003, Harvey Jones died.

On August 4, 2003, Will Jones and Dennis Jones had their mother, Mildred, sign three documents: (1) Agreement Between Shareholders For Transfer of Stock By Gift (C.P. 367-69); (2) Right of First Refusal (C.P. 230-34); and (3) Agricultural Property Lease-Option (C.P. 236-51). By the Agreement For Transfer of Stock By Gift, Mildred gifted to Will and Dennis the 139 shares of Harvey L. Jones Farms, Inc. that she and her husband, Harvey, owned as

their community property. C.P. 368. Will Jones and his wife and Dennis Jones and his wife owned, between them, the other 66 shares (total) of Harvey L. Jones Farms, Inc. C.P. 304, 367-69. (There were a total of 205 shares of Harvey L. Jones Farms, Inc. C.P. 304.)

On January 16, 2004, the Harvey L. Jones will was admitted to probate. C.P. 81.

On July 17, 2007, Mildred Jones died. C.P. 282, 304. Will Jones was appointed as personal representative of the Mildred Jones estate. C.P. 282.

On November 24, 2007, Teresa and Mary Ann filed a Creditor's Claim. C.P. 28, 320. On December 7, 2007, Will and Dennis filed a Creditor's Claim. C.P. 320.

On April 30, 2008, Will Jones also made application to be appointed as successor personal representative in the Harvey L. Jones estate. C.P. 82, 282.

On July 31, 2008. Will Jones and Dennis Jones filed a Dispute Resolution Petition (Chapter 11.96A). On January 14, 2010, Teresa Engbretson and Mary Ann Sealock filed a Dispute Resolution Petition (Chapter 11.96A). C.P. 1-7, 29.

In December 2009, Will Jones and Dennis Jones formed Jones Farms, LLC. C.P. 339. On January 8, 2010, Will Jones filed an Intention to Exercise Option, C.P. 75, proposing to sell the 178 acres owned by Harvey and Mildred to Jones Farms, LLC for a purchase price of \$285,389.13 and an assumption of debt (to FSA and MetLife) totaling \$185,417.87. C.P. 76-77, 339.

On January 29, 2010, Will Jones filed a Motion for Summary Judgment. C.P. 59, 282-82. In his Memorandum of Authorities in Support of the Motion for Summary Judgment, Will Jones said:

After becoming aware of Mr. Jones' plans to seek dismissal of their creditor's claim, Mildred's daughters recently filed a TEDRA petition. Their TEDRA petition essentially repeats the allegations made in the creditor's claim. However, instead of purporting to state a claim for money damages as against Mildred's estate, the TEDRA petition seeks rescission or cancellation of documents signed by Mildred in August of 2003 which give rise to this dispute. But, the claims of the TEDRA petition must be dismissed because they are time barred and because Mildred's daughters are otherwise estopped from seeking the requested relief.

C.P. 283.

On June 8, 2010, the parties argued the Motion for Summary Judgment filed by Will Jones to the Honorable F. James Gavin, Yakima County Superior Court judge. Judge Gavin denied the Motion for Summary Judgment. On June 22, 2010, Judge Gavin

filed with the court his Summary Judgment Decision. C.P. 11-17, 433-39. On September 17, 2010, Judge Gavin filed an Order Denying Personal Representative's Motion for Summary Judgment. C.P. 18-20, 440-42.¹

On March 2, 2011, a Stipulation and Order Appointing Judge Pro Tem was signed and filed with the court. C.P. 21-24.

On March 15, 2011, Will Jones filed a second Motion for Summary Judgment. In his Memorandum of Authorities filed in support of the Motion, Will Jones said:

. . . the fundamental issue to be decided in the proceedings is whether Mildred's daughters have some legal or equitable right to pursue any cause of action that would entitle them to rescind the 2003 agreements. As discussed below, no such right exists under the circumstances here.

C.P. 29.

On April 21, 2011, the parties argued the second Motion for Summary Judgment filed by Will Jones to Judge Pro Tem Peters. Judge Pro Tem Peters said that Teresa and Mary Ann had a legal

¹ With respect to the argument made by Will Jones that Teresa and Mary Ann had to elect their remedies (either money damages or rescission of the August 2003 subject documents), Judge Gavin interlineated on his September 17, 2010 Order that "they shall elect on or before December 15, 2010." C.P. 19, 441. Although Teresa and Mary Ann never filed a formal Notice of Election, they did, through counsel, notify Will Jones that they sought rescission of the August 2003 documents and not monetary damages against the estate of their mother.

right, pursuant to RCW 11.96A, to seek rescission of the documents.

THE COURT: Okay, I didn't comment - - I think the TEDRA statute allows them to file a rescission action, or seek rescission relief in this context.

MR. TABLER: Of what?

THE COURT: I guess the problem is how do we even get to the issue of rescission of the documents in 2003 were valid?

MR. TABLER: You can't.

THE COURT: I'm answering the question though about whether or not they have a right to bring - - I'm not saying they can rescind. But you said they can't even bring an action to rescind. I think the TEDRA's -
-

MR. TABLER: They're not parties to those contracts.

THE COURT: Okay. I think the TEDRA statute allows - -

MR. TABLER: Oh - -

THE COURT: Them to bring the action, but I guess the problem is that if my ruling is correct that those instruments are valid then there's nothing to rescind.

V.R.P. 32.

THE COURT: And I did believe that they had a right to bring a TEDRA action including asking for the relief of rescission which they cannot get because the documents are valid.

V.R.P. 38.

Although Judge Pro Tem Peters said, in his opinion, that Teresa and Mary Ann have a right to seek rescission of the subject documents, he also said that he found that Mildred Jones was not in a confidential relationship with her sons and that, therefore, the

August 2003 documents were not the result of undue influence. Since he so found, he said that he would grant the Motion for Summary Judgment. V.R.P. 34.

On April 21, 2011, Judge Pro Tem Peters signed an Order Granting Motion for Summary Judgment. C.P. 114-16.

On April 30, 2011, Teresa and Mary Ann filed a Motion for Reconsideration. C.P. 117-24.

On May 21, 2011, Judge Pro Tem Peters signed and filed an Order For Motion For Reconsideration, in which he denied the Motion for Reconsideration filed by Teresa and Mary Ann. C.P. 157.

On June 14, 2011, Teresa and Mary Ann filed their Notice of Appeal. C.P. 163-69.

III. ARGUMENT

STANDARD OF REVIEW

This is an appeal from an order granting a motion for summary judgment. In reviewing an order of summary judgment, a court of appeals engages in the same inquiry as a trial court. *Callahan v. Walla Walla Housing Auth.*, 126 Wn. App. 812, 818, 110 P.3d 782 (2005).

The appellate court should consider all facts and reasonable inferences in the light most favorable to the nonmoving party. *Woodall v. Freeman Sch. Dist.*, 136 Wn. App. 622, 628, 146 P.3d 1242 (2006); *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). The court must determine whether a genuine issue of material facts exists and must not resolve an existing factual issue. *Woodall v. Freeman Sch. Dist.*, 136 Wn. App. at 628; *Thoma v. C.J. Montag & Sons, Inc.*, 54 Wn.2d 20, 26, 337 P.2d 1052 (1959). A material fact is a fact upon which the outcome of the litigation depends. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

A court of appeals reviews an order granting summary judgment de novo. *Hill v. Sacred Heart Med. Ctr.*, 143 Wn. App. 438, 445, 177 P.3d 1152 (2008). Summary judgment is appropriate only if the nonmoving party fails to produce sufficient evidence which, if believed, would support the essential elements of his/her/their claim. *Id.*; *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001).

A. THE TRIAL COURT ERRED IN FINDING THAT WILL AND DENNIS JONES WERE NOT IN A CONFIDENTIAL RELATIONSHIP WITH AND DID NOT EXERT UNDUE INFLUENCE ON THEIR MOTHER WHEN THEY HAD HER SIGN THE SUBJECT DOCUMENTS IN 2003.

The issue before the trial court in the second motion for summary judgment was whether Teresa Engbretson and Mary Ann Sealock could seek rescission of the subject 2003 documents. “[T]he fundamental issue to be decided in these proceedings is whether Mildred’s daughters have some legal or equitable right to pursue any cause of action that would entitle them to rescind the 2003 agreements.” C.P. 29.

In his second motion for summary judgment, Mr. Jones did not ask the trial court to determine whether he and his brother were in a confidential relationship with their mother in 2003 or if they exerted undue influence over her. These were factual issues that Mr. Jones asked the trial court to resolve in his first motion for summary judgment. These issues were decided against Mr. Jones by Judge Gavin when he denied the first motion for summary judgment. C.P. 11-17, 433-39, 18-20, 440-42. Nevertheless, without being asked to decide this factual issue, Judge Pro Tem Peters, sua sponte, found that Will and Dennis were not in a confidential relationship with their mother and that there was no undue influence.

THE COURT: Well, I read all of this and I can tell you what I think. I think there is no genuine issue of

fact on those documents. I don't believe - - I don't see evidence of undue influence. I don't see evidence of fraud and that those documents that were executed in 2003 were valid. So having said that as what I conclude, the additional problem concerning whether or not there was a Trust created - - in other words, whether she had the right to sign papers - - was the Trust ever created? And I think it's undisputed that it wasn't.

How that gets solved - - if it as easy as Mr. Tabler says maybe that's how you solve it but it seems that at the time she signed it there was no Trust created. I'm not sure having read all this how you do create the Trust.

V.R.P. 30.

Mr. Jones did not ask Judge Gavin to reconsider his order denying the first motion for summary judgment. No discovery was conducted on the issues of a confidential relationship or undue influence between the first motion for summary judgment (and the court's denial thereof) and the second motion for summary judgment. Judge Pro Tem Peters should not have, sua sponte, decided these factual issues that Judge Gavin had previously decided. By application of the doctrines of stare decisis, Law of the Case, and res judicata, it was error for Judge Pro Tem Peters to decide these factual issues.²

² See discussion of stare decisis, Law of the Case, and res judicata at pages 23-25.

Since Teresa and Mary Ann were the nonmoving parties, all inferences should have been made in their favor. *Woodall v. Freeman Sch. Dist.*, 136 Wn. App. 622, 628, 146 P.3d 1242 (2006). See also *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883, P.2d 1383 (1994). In her Declaration, Teresa described her mother's emotional state after her husband (Harvey) died and how she relied on Will and Dennis to conduct the business of the farm.

8. Our mother greatly missed her husband. She was very emotionally impacted by his death. She had never, to my knowledge, been actively involved in making farm business decisions prior to his death. She did, however, want to continue to live in her family home (located on two acres contiguous to the farm land that she and our dad owned together).

12. Our mother developed health and mental problems after our father died. I think his death threw her emotionally. She was never a sophisticated business woman. She relied on our dad to run the family farm. When he died, she relied entirely on Will and Dennis.

Declaration of Teresa Engbretson in Opposition to the Motion for Summary Judgment Filed By Will Jones. C.P. 333, 334.

This case is a classic example of a confidential relationship between an elderly parent and her children and how undue influence may be exerted.

[T]he parent may become dependent upon the child, either for support and maintenance, or for care or protection in business matters as well, or for both, and the child, by virtue of factors of personality and superior knowledge and the assumption of the role as advisor accepted by the parent, may acquire a status, vis-a-vis the parent, that may bring about the confidential relationship.

McCutcheon v. Brownfield, 2 Wn. App. 348, 357, 467 P.2d 868 (1970).

The situation described in *McCutcheon v. Brownfield* is exactly the situation with Mildred Jones and her sons. Mildred had recently lost her husband, her sons, who ran the farming operation, went to her, together with their financial advisor, Eric Weinheimer³, and told her that they would take care of everything if she would sign various documents. Documents that she signed without benefit of legal counsel. C.P. 304-305, 334.

The case of *Lewis v. Estate of Lewis*, 45 Wn. App. 387, 725 P.2d 644 (1986) states that "The essential elements of a confidential relationship are (1) that the parent reposes some special confidence in the child's advice and (2) that the child purports to advise with his parent's interest in mind." 45 Wn. App.

³ As for the character of Mr. Weinheimer, who is behind and drafted all the August 2003 documents and has advised Will Jones throughout this case, see "Eric Weinheimer Character for Truthfulness or Untruthfulness" in Memorandum of Authorities of Teresa Engbretson and Mary Ann Sealock in Opposition to Motion for Summary Judgment (Re: Rescission) Filed by Personal Representative Will Jones. C.P. 312-317.

at 391. This is exactly what Will and Dennis did relative to their mother.

If a confidential relationship exists, the burden is on the party claiming that there was not undue influence to convince the court that undue influence was not exerted.

As a general rule, the party seeking to set aside an *inter vivos* gift has the burden of showing the gift is invalid. *Lewis v. Estate of Lewis*, 45 Wn. App. at 387, 388, 725 P.2d 644 (1986). But if the recipient has a confidential or fiduciary relationship with the donor, the burden shifts to the donee to prove "a gift was intended and not the product of undue influence."

Endicott v. Saul, 142 Wn. App. 899, 922, 176 P.3d 560 (2008).

A recent case discussing undue influence is *Estate of Haviland*, 162 Wn. App. 548, 255 P.3d 854 (2011). In that case, a widow appealed the trial court's decision invalidating her husband's will as the product of undue influence. Citing the case of *Dean v. Jordan*, 194 Wash. 661, 79 P.2d 331 (1938), the court said "In *Dean*, our Supreme Court announced that a combination of suspicious facts and circumstances may give rise to a rebuttable presumption of undue influence." *Estate of Haviland*, 162 Wn. App. at 558. According to *Estate of Haviland*, the "most important" suspicion-relating facts include:

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

Dean v. Jordan, 194 Wash. at 672. (Quoted with approval in *Estate of Haviland*, 162 Wn. App. at 558.)

In the Jones case, Will and Dennis were in a confidential relationship with their mother. They actively participated, with the assistance of their financial advisor, Eric Weinheimer, in the preparation of the August 2003 documents. Will and Dennis, if the 2003 documents are found valid, will end up with a larger share of the estates than their parents expressly wanted. In addition, and as stated by the court in *Dean v. Jordan*, Mildred, when she signed the August 2003 documents, was old, in poor health, did not have independent legal representation, and relied on her sons to make farm decisions for her. C.P. 307, 333-34.

All of this should, as the court said in *Estate of Haviland*, raise the presumption of undue influence. If so, "the burden shifts to [Will and Dennis Jones] to rebut it with 'evidence sufficient at

least to balance the scales and restore the equilibrium of evidence touching the validity of the [August 2003 documents].’ In the absence of rebuttable evidence, the evidence raising the presumption may be sufficient to invalidate the [August 2003 documents].” *Estate of Haviland*, 162 Wn. App. at 558-559.

If there was a confidential relationship the burden is on Will and Dennis to convince the court that they did not exert undue influence. *Endicott v. Saul*, 142 Wn. App. at 922. On which point, “If the judicial mind is left in doubt or uncertainty as to exactly what the status of the transaction was, the donee must be deemed to have failed in the discharge of his burden and the claim of gift must be rejected.” *McCutcheon v. Brownfield*, 2 Wn. App. at 356. As for the burden of proof, *Endicott v. Saul* states that the donee’s burden is proof by “clear, cogent and convincing evidence.” 142 Wn. App. at 922.

On August 4, 2003, Will and Dennis not only had their mother sign what was for them a very favorable Lease-Option, they also had her gift to them all of the shares of Harvey L. Jones Farms, Inc. that she and her husband held. There was no consideration given for this gift. There was no need for Mildred to gift the shares to Will and Dennis. The fact that they had their

mother gift the shares is evidence of the undue influence exerted by them over their mother. All of which resulted in a substantial reduction of the net values of the Harvey L. Jones and Mildred L. Jones estates.

In a motion for summary judgment, when all inferences are to be made in favor of the nonmoving party (i.e., Teresa and Mary Ann), and a prior judge ruled that there were genuine issues regarding this material fact, it was error for Judge Pro Tem Peters to find that Will and Dennis were not in a confidential relationship with their mother and did not exert undue influence.

B. THE TRIAL COURT ERRED WHEN IT GRANTED THE MOTION FOR SUMMARY JUDGMENT RE: RESCISSION FILED BY PERSONAL REPRESENTATIVE WILL JONES.

1. The issue of rescission was previously argued in a Motion for Summary Judgment filed by Will Jones. Judge Gavin denied that Motion.

Rescission was argued to the court as part of the first motion for summary judgment filed by Mr. Jones. In the Memorandum of Authorities in Support of Personal Representative's Motion for Summary Judgment, C.P. 282-302, there were six sub-parts/arguments:

- A. Summary Judgment is Appropriate;
- B. Creditor's Claim is Invalid as a Matter of Law;
- C. Estate Has No Liability Arising From Mental Incompetence, Fraud, Undue Influence or Misrepresentation;
- D. Claims For Rescission/Cancellation Barred By Doctrine of Election of Remedies;
- E. Claims Arising From Breach of Fiduciary Duty, Fraud, Undue Influence and Misrepresentation Are Time Barred; and
- F. Daughters Estopped From Claiming Damages.

C.P. 289-301.

Judge Gavin denied the first motion for summary judgment. His Order Denying Personal Representative's Motion for Summary Judgment, filed September 17, 2010, C.P. 18-20, 440-42, said "that to the extent said motion raises the doctrine of election of remedies as a defense to claims for monetary damages, said motion would be granted if Teresa Engbretson and Mary Ann Sealock request money damages in addition to claims for rescission. They shall elect before December 15, 2010." C.P. 19, 441. By letter to Michael Tabler, Tom Scribner, on behalf of Teresa Engbretson and Mary Ann Sealock, made the election, indicating that they seek rescission of the subject documents, not monetary damages. C.P. 60.

In the Summary Judgment Decision that Judge Gavin signed on June 20, 2010, C.P. 11-17, 433-39, as concerns the issue of rescission, he wrote:

The Jones argue that the TEDRA petition is based on invalidity and unenforceability of the documents signed by their mother in August, 2003. They are also claiming money damages. To allow both rescission and damages would result in allowing a double recovery for a single wrong.

Ms. Engbretson and Ms. Sealock respond that they “are not trying to disaffirm their mother’s will or their father’s will. The documents that are being challenged are the documents prepared by Will and Dennis for their mother to sign. Those documents, if affirmed by this court, will result in a substantial reduction in the value of the estates.” (Page 22, Memo in Opposition).

If they are seeking money damages in addition to a “share and share alike” distribution of estate assets under the wills, the remedies election doctrine is applicable. They, however, do not appear to be claiming additional damages. What they apparently are claiming is equal shares under the wills of their parents. The amount of each net share depends on the value of the assets being distributed under the terms of the wills. The amount of each share is affected by the validity of the August documents. That determination is for trial.

The motion to elect is denied unless they are seeking money damages in addition to their claim of equal shares under the wills. If they are, it is granted, and they must elect.

C.P. 14, 436.

Judge Pro Tem Peters should have respected and followed the prior ruling of Judge Gavin on this issue based on any or all of the doctrines of stare decisis, Law of the Case, or res judicata.

Stare Decisis:

This doctrine supports a “strong judicial policy that the determination of a point of law by a court will generally be followed by a court of the same or lower rank in a subsequent case which presents the same legal problems.” *Ballentine’s Law Dictionary*, 3rd Ed. (1969). According to the Washington Supreme Court:

under the doctrine of stare decisis, “once we have ‘decided an issue of state law, that interpretation is binding until we overrule it.’” *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 327 n.3, 971 P.2d 500 (1999) (quoting *Hamilton v. Dep’t of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988)).

Pers. Restraint of Lechappelle, 153 Wn.2d 1, 5, 100 P.3d 805 (2004).

Since Judge Gavin had earlier decided the issue it was, applying the doctrine of stare decisis, error for Judge Pro Tem Peters to deviate from that decision.

Law of the Case:

In its most common form, “the Law of the Case doctrine stands for the proposition that once there is [a holding of the court]

enunciating a principal of law, that holding will be followed in subsequent stages in the same litigation.” *Robertson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). “In all of its various formulations the doctrine seeks to promote finality and efficiency in the judicial process.” *Id.*

In this case, Judge Pro Tem Peters should have followed the decision of the court in the first motion for summary judgment.

Res Judicata:

The doctrine of res judicata prevents litigation of the same claim or issue when a subsequent claim or issue involves the same subject matter, cause of action, persons and parties. *Estate of Black*, 153 Wn.2d 152, 170, 102 P.3d 796 (2004). Applying the doctrine of res judicata, or claim preclusion, in this case Judge Pro Tem Peters should not have relitigated the issue of rescission that Judge Gavin had earlier decided and ruled on.

According to *Estate of Black*:

This [res judicata] doctrine applies to issues decided on summary judgment. Because “[a] grant of summary judgment was a final judgment on the merits with the same preclusive effect as a full trial,” [*deYoung v. Cenex, Ltd.*, 100 Wn. App. 885, 892, 1 P.3d 587 (2000)]. An unappealed summary judgment is res judicata as to rights determined during summary judgment. See *Lowe v. WL Props., Inc.*, 105 Wn. App. 888, 896, 20 P.3d 500 (2001) (stating

that an unappealed summary judgment became res judicata as to a party's maintenance rights, which had been determined in a summary judgment proceeding).

Estate of Black, 153 Wn.2d at 170.

In this case, Judge Gavin earlier decided the issues of a confidential relationship between Will and Dennis and their mother, whether there was undue influence, and whether Teresa and Mary Ann could rescind the August 2003 documents. That decision, which was an order of the court, C.P. 11-17, 433-439, 440-42, was or should have been the law of this case and a res judicata bar to Judge Pro Tem Peters deciding, on a second motion for summary judgment, issues that had previously been decided.

2. Teresa Engbretson and Mary Ann Sealock have a right to seek rescission of the subject documents. Judge Pro Tem Peters so stated.

The second motion for summary judgment filed by Will Jones, which motion is the object of this appeal, asked "whether Mildred's daughters have some legal or equitable right to pursue any cause of action that would entitle them to rescind the 2003 agreements." C.P. 29. In the Conclusion to his Memorandum, Mr. Jones "respectfully ask[ed] that the court grant summary judgment

and dismiss all causes of action seeking rescission, as a matter of law.” C.P. 30.

The issue, then, before the court on the second motion for summary judgment was rescission of the 2003 documents. Concerning which, Judge Pro Tem Peters orally agreed that Teresa and Mary Ann have a right, and that the Trust Estate Dispute Resolution Act (TEDRA) allows them, to seek rescission of the 2003 documents. V.R.P. 32, 38.

In his motion for summary judgment, Will Jones argued that strangers cannot rescind contracts to which they are not parties. C.P. 32-33. As a general statement of the law, this is correct. But

Teresa and Mary Ann are parties in their own right to the documents that their mother signed in 2003 and are bringing this action for and on behalf of the estates of their parents - - which estates clearly are parties. They are, therefore, not “strangers” to the 2003 documents.

RCW 11.96A.020(1), the TEDRA statute, gives the court “full and ample power and authority” to settle “All matters concerning the estates and assets of . . . deceased persons.” At issue in this case are the estates of Harvey Jones and Mildred Jones, deceased persons. The trial court had statutory authority to resolve the

issues raised by Teresa and Mary Ann as concerns the estates of their parents. The August 2003 documents are a “Matter” as defined at RCW 11.96A.030(1). According to that statute, “Matter” includes any issue, question, or dispute involving “The determination of any class of creditors . . . heirs . . . or other persons interested in an estate, trust . . . or with respect to any other asset or property interest passing at death.” RCW 11.96A.030(1)(a). “Persons interested in an estate or trust” is defined to include “all persons beneficially interested in the estate or trust.” RCW 11.96A.030(5). “Matter” is also defined to include “The determination of any question arising in the administration of an estate or trust . . . or with respect to any other asset or property interest passing at death, that may include, without limitation, questions relating to: (i) The construction of . . . other writings.” RCW 11.96A.030(1)(c). The August 2003 documents are “other writings,” the validity of which the trial court had, and this court has, the authority to address and determine.

RCW 11.96A.030(4) defines “party” or “parties” to mean “each of the following persons who have an interest in the subject of the particular proceeding and whose name and address are known to, or are reasonably ascertained by, the petitioner. . . . An

heir; a beneficiary, including devisees, legatees, and trust beneficiaries; . . . Any other person who has an interest in the subject of the particular proceeding.” Teresa and Mary Ann have such an interest.

Clearly, on the authority of RCW Chapter 11.96A, Teresa and Mary Ann are parties, have standing and have a legal right to seek rescission, on their own behalf and on behalf of the estates of their parents, of the subject documents.

3. Teresa Engbretson and Mary Ann Sealock acted timely to seek rescission, their right to seek rescission is not time barred.

Mr. Jones next argued that Teresa and Mary Ann may not seek rescission of the subject documents because they did not act promptly while continuing to accept contract benefits. C.P. 33. This same issue was argued to and decided by Judge Gavin in the first motion for summary judgment: “Claims Arising From Breach of Fiduciary Duty, Fraud, Undue Influence, and Misrepresentation Are Time Barred.” C.P. 295-99.

Mildred Jones died on July 17, 2007. Her will was admitted to probate on August 3, 2007. Teresa and Mary Ann filed their Creditor’s Claim on November 29, 2007 and their Dispute

Resolution Petition on January 14, 2010. Dennis and Will Jones filed their Creditor's Claim on December 7, 2007. C.P. 325. The Probate Note to Creditors was published in the Daily Sun News each week for three consecutive weeks beginning on August 20, 2007. An Affidavit of Publication regarding the publication of the notice was filed with the court. C.P. 325.

RCW 11.40.051 states that:

(a) If the personal representative provided notice under RCW 11.40.020 and the creditor was given actual notice as provided in RCW 11.40.020(1)(c), the creditor must present the claim within the later of: (i) Thirty days after the personal representative's service or mailing of notice to the creditors; and (ii) Four months after the date of the first publication of the notice.

Teresa and Mary Ann were not mailed a notice by Will Jones. They received notice by publication. C.P. 325. The time frame to file a creditor's claim expired four months from the date of the first publication (August 20, 2007). Therefore, the Creditor's Claim filed by Teresa and Mary Ann was/is timely and not time barred. (Nor is the Creditor's Claim filed by Will and Dennis Jones on December 7, 2007 time barred).

RCW 11.96A.040 gives to the superior court of every county "provisional subject matter jurisdiction over the probate of wills and

the administration of estates of . . . deceased individuals in all instances.” RCW 11.96A.070 discusses the statutes of limitations for actions brought under the chapter. RCW 11.96A.070(2), which is applicable in this case, states:

Except as provided in RCW 11.96A.250 with respect to special representatives, an action against a personal representative for alleged breach of fiduciary duty by an heir, legatee, or other interested party must be brought before discharge of the personal representative.

Will Jones was appointed as personal representative on August 3, 2007. The probate is not completed. Will Jones has not been discharged as personal representative. C.P. 326. Pursuant to RCW 11.96A.070(2), the Dispute Resolution Petition filed by Teresa and Mary Ann is timely and not time barred.

If there is a three-year statute of limitations regarding filing a Dispute Resolution Petition, the three years should not begin to run until Teresa and Mary Ann discovered or reasonably should have discovered the basis of their claim with respect to the August 4, 2003 documents signed by their mother. As stated by Teresa Engbretson in her declaration, she and Mary Ann did not see the subject documents until after their mother died on July 17, 2007.

C.P. 332-36. Their Dispute Resolution Petition was filed on January 14, 2010, within that three-year time frame.

It was not until Mildred Jones died that Teresa and Mary Ann learned that their father's estate had not been probated, that a trust was to have been established for their mother, and that various documents were signed by their mother on August 4, 2003, which documents significantly impacted and reduced the value of the Harvey Jones estate and the Mildred Jones estate. All of which is explained by Teresa Engbretson in her Declaration in Opposition to Motion for Summary Judgment Filed by Will Jones. C.P. 332-36.

In his first Motion for Summary Judgment, Will Jones claimed that in June 2003 when he and his brother and Eric Weinheimer met with Teresa and Mary Ann, "The details of the proposed financial plan were specifically discussed with, and explained to Mildred's daughters that day." C.P. 297. This statement is disputed and contradicted by the Declaration of Teresa Engbretson filed in opposition to the first Motion for Summary Judgment. C.P. 332-36.

Moreover, as stated by Teresa Engbretson in her Declaration, C.P. 332-36, at the meeting in June 2003, she and Mary Ann were told by their brothers that their mother and the

corporation were broke. C.P. 334. On another date they were told that their mother personally owed money on farm loans. They trusted their brothers to be honest. As they have subsequently found out, those representations were not correct. They did not find this out until after their mother died in July 2007. C.P. 335.

In his Memorandum of Authorities in Support of Personal Representative's Motion for Summary Judgment, C.P. 282-302, in support of his first motion for summary judgment, Will Jones cited the case of *Hudson v. Condon*, 101 Wn. App. 866, 6 P.3d 615 (2000) with regard to when a cause of action based on an allegation of breach of fiduciary duty, fraud or misrepresentation begins to run. That case states that "Under the express terms of RCW 4.16.080(4), a cause of action for fraud does not accrue until the aggrieved party discovers the facts constituting a fraud." 101 Wn. App. at 875. "We infer actual knowledge of fraud if the aggrieved party, through due diligence, could have discovered it." *Id.* *Hudson v. Condon* then concludes: "Accordingly, the statute of limitations for a damage action based on fraud commences when the aggrieved party discovers, or should have discovered, the fact of fraud or sustains some damage as a consequence." *Id.* See

also *First Md. Leasecorp v. Rothstein*, 72 Wn. App. 278, 283, 864 P.2d 17 (1993).

Teresa and Mary Ann did not sustain damage in 2003. They did not sustain damage between 2003 and when their mother died in 2007. Prior to her death, Mildred Jones could have changed her will. It was not until Mildred died and her will was admitted into probate, at which time her brothers sought to conclude the probate by valuing the assets based on and using the documents signed by Mildred in August 2003, that Teresa and Mary Ann for the first time recognized that they would sustain damage by virtue of the diminution in value of the estates of Harvey Jones and Mildred Jones. As such, the three year statute (if it applies) did not begin to run until Mildred died and her will was admitted into probate (on August 3, 2007) (at the earliest).

Judge Gavin, who denied this argument in the first motion for summary judgment, addressed this time bar issues in his Summary Judgment Decision. C.P. 14-16, 436-38.

Limitation period:

Ms. Engbretson and Ms. Sealock have filed a creditor's claim and a TEDRA action. RCW 11.96A is a specific RCW chapter under Title 11 RCW. It concerns trust and estate resolution. It exists "to provide nonjudicial methods for the resolution of

matters, such as mediation, arbitration, and agreement. (It) also provides for judicial resolution of disputes if other methods are unsuccessful.” (RCW 11.96A.010).

Insofar as the TEDRA action includes a claim of breach of fiduciary duty, RCW 11.96A.070(2) applies. Since Mr. Will Jones remains personal representative, the limitation period has not run. The motion is denied with respect to this claim.

Insofar as all other claims, RCW 4.16.080(4) applies. Consequently, the three-year limitation period applies.

Facts known or should have been known with due diligence:

Although there is proof of some knowledge in 2003 by Ms. Engbretson and Ms. Sealock of the August documents, material issues of fact exist with regard to when they knew of sufficient facts to discover they had a claim and whether they exercised due diligence to discover the existence of a claim. A review of the evidence does not result in a conclusion that reasonable minds could reach only one conclusion.

C.P. 16, 438.

C. THERE ARE GENUINE ISSUES OF MATERIAL FACT REGARDING THE FIVE “MATERIAL FACTS” CONCERNING WHICH WILL JONES SAID THERE WERE NONE.

In his Memorandum of Authorities in Support of Personal Representative’s Motion for Summary Judgment, Will Jones said that, for the purpose of his Motion for Summary Judgment Re: Rescission:

The only material facts are (1) Mildred's daughters are not parties to the 2003 agreements; (2) since 2003 Mildred's sons and their corporation made all required payments to Mildred and/or her estate without any complaint, question or objections from Mildred or her daughters; (3) since 2003 Mildred's sons and their corporation made significant capital improvements to land owned by their parents without any complaint, question or objection from Mildred or her daughters; (4) Mildred's daughters did not assert any right to rescind the 2003 documents until filing their TEDRA petition on January 14, 2010 - - more than six years after the 2003 agreements were executed by Mildred and her sons; and (5) Mildred's daughters demand rescission notwithstanding the fact they refuse to make any offer to restore Mildred's sons and their corporation to their original positions as if no contract ever existed.

C.P. 30.

With respect to the five material facts, Mr. Jones said "the above facts are not in dispute, all causes of action requesting rescission must be dismissed, as a matter of law." C.P. 30. Judge Pro Tem Peters never addressed these facts in his oral opinion/decision. Teresa and Mary Ann do not agree that they are not in dispute. They are. Moreover, making all inferences in favor of Teresa and Mary Ann, as the court is required to do in a motion for summary judgment, it was error for Judge Pro Tem Peters to summarily dispose of these material facts.

1. Teresa Engbretson and Mary Ann Sealock were parties to the 2003 subject documents/agreements.⁴

To argue that Teresa and Mary Ann are not parties to the August 2003 documents and therefore have no standing/legal right to challenge them is to misunderstand or mischaracterize what is at issue in this case. Teresa and Mary Ann are acting for and on behalf of the estates of their parents in an effort to recover/reclaim assets that were taken from their mother (and their father's estate) by the undue influence exerted by Will and Dennis. As such, the parties to this litigation are the Harvey and Mildred Jones estates. Therefore, it is incorrect and misleading to argue that Teresa and Mary Ann have no right to bring this action because they are not parties. They are bringing this action for and on behalf of the estates to recover for the estates assets that should be part thereof.

Mr. Jones argued that Teresa and Mary Ann "have [no] authority to represent either of their parents' estates." C.P. 32. This, of course, is legally incorrect and contrary to Washington law. RCW 11.96A.020 gives to the court "full and ample power and authority" to settle all matters concerning the estates of deceased persons. As defined in the statute, "Matter" includes any issue,

⁴ See the argument re: this issue in Section B.2 above.

question or dispute involving: “The construction of wills, trusts, community property agreements, and other writings.” RCW 11.96A.030(1)(c). The August 2003 documents are “other writings” as defined by the statute.

There are numerous Washington cases in which an heir challenged the administration of an estate or the action (or inaction) of the personal representative. See, for example, *Estate of Cooper*, 81 Wn. App. 79, 913 P.2d 393 (1996), in which a beneficiary of the corpus of a testamentary trust sought (1) to have her father removed as co-trustee of the trust and personal representative of the estate, (2) an accounting of the trust, and (3) a declaration that her father’s second wife had no interest in the trust property. The superior court entered a judgment generally in favor of the plaintiff. On appeal, the Court of Appeals affirmed the judgment in part, reversed in part, and remanded for recalculation of attorney fees (awarded in favor of the plaintiff).

As heirs, Teresa and Mary Ann are also themselves parties to any action taken or documents signed that result in a loss or diminution in value of estate assets. The validity or invalidity of these documents affects the assets in and values of the estates. All heirs have a legal interest in this issue and are parties to the

outcome. See, for example, *Estate of Wood*, 88 Wn. App. 973, 947 P.2d 782 (1997).

In *Estate of Wood*, Nancy Russell, daughter of the deceased, was appointed personal representative. The court later removed her as personal representative. Ms. Russell appealed the order removing her as personal representative. An issue on appeal was whether Ms. Russell had standing to bring the appeal. The argument against Ms. Russell bringing the appeal was that she was not an “aggrieved party” as required by RAP 3.1. The Court of Appeals, which found that Ms. Russell was an aggrieved party and had standing to bring the appeal, said that an aggrieved party is “someone whose proprietary, pecuniary, or personal rights are substantially affected.” 88 Wn. App. at 976.

As an heir, she has a pecuniary and personal interest in the administration of her mother’s estate. Thus, she qualifies as an aggrieved party and has standing to bring this appeal.

Estate of Wood, 88 Wn. App. at 977.

The situation confronting Teresa and Mary Ann is the same. They both have a pecuniary and a personal interest in the administration of the estates of their parents. As such, they are aggrieved parties and have standing and the right to bring this

action before the court.

Granted, Teresa and Mary Ann did not sign the August 2003 documents, but that does not invalidate their right to challenge the actions of the personal representative (Will) who, together with his brother (Dennis), took advantage of their mother to the detriment of the estates. As stated in RCW 11.96A.020(1)(a), the court “shall have full and ample power and authority” to settle all “matters concerning the estates and assets of . . . deceased persons.”

2. It is not known/established that Will Jones and Dennis Jones made all payments as required. Teresa Engbretson and Mary Ann Sealock did complain, question and make objection once they found out what documents (i.e., the 2003 subject documents) Will Jones and Dennis Jones had their mother sign.

It has not been determined or agreed that Will and Dennis made all required payments to Mildred. On this issue, Teresa and Mary Ann sent interrogatories and requests for production to Will Jones regarding the Creditor’s Claim filed by Will and Dennis and the issues of what payments they made to Mildred, what improvements they made to the property, etc. In response, Will, as personal representative, objected to every interrogatory and every

request for production. No answers or information were provided to any of that discovery. Instead, the stock responses given by Will were as follows:

Response to Request for Production NO 3-4: Objection. Production of documents used or relied on as a basis for preparation of the subject Creditor's Claim is more properly propounded to the persons who actually participated in the preparation of said Creditor's Claim.

Answer to Interrogatory NO. 3-7: Objection. This interrogatory is objectionable to the extent it is propounded to Will L. Jones in his capacity as the personal representative of the Mildred L. Jones estate and in his capacity as successor personal representative of the Harvey L. Jones estate. Neither estate is under any obligation or requirement to spend time or money speculating about the meaning and intent of the Creditor's Claim prepared by attorney Jerome R. Aiken on behalf of claimants. The information requested by this interrogatory is more readily obtained from Mr. Aiken and his clients.

C.P. 63.

On receipt of the objections and non-answers, Teresa and Mary Ann communicated with Jerome Aiken, the Yakima attorney who prepared the Creditor's Claim for Will and Dennis. C.P. 63.

In response, he said, in relevant part:

In light of your client's [sic] election, my clients are willing to conditionally withdraw the Creditor Claim they filed. The withdrawal is conditioned on the fact that my clients are not waiving any remedies or relief that may be available to them should the court in the

TEDRA action grant rescission of the various agreements at issue. The remedies and relief would generally be to restore my clients to the status quo that existed prior to the execution of the agreements at issue. . . .

I submit the conditional withdrawal of my client's [sic] Creditor Claim renders the discovery request you propounded upon my client Will Jones moot. Thus, he will not be responding to those discovery requests because such a response is improper and unnecessary.

C.P. 101.

Will Jones has produced no evidence regarding what payments (if any) he and Dennis made. It is also not true that Teresa and Mary Ann did not complain about, question or object. Once they found out what Will and Dennis did, they retained an attorney (initially George Velikanje of Yakima) and this litigation was filed. Concerning this issue, see the Declaration of Teresa Engbretson and Mary Ann Sealock filed July 3, 2008. C.P. 79-84.

3. It is not known/established what "significant capital improvements" Will Jones and Dennis Jones made to land owned by their parents.

Will and Dennis have produced absolutely no accounting of what they have done with regard to their claim of "significant capital improvements to land owned by their parents." That was, in part,

the focus of the third set of interrogatories and requests for production that Teresa and Mary Ann served on them. They objected to that discovery and have refused to produce any information, documentation, accounting, etc. C.P. 62-64.

With regard to this issue, and the claim by Will and Dennis that they have “made significant capital improvements to land owned by their parents,” Will Jones has a statutory obligation to file, no less frequently than annually, a report of the affairs of the estate. RCW 11.76.010. Since being appointed successor personal representative of the Harvey Jones estate and the personal representative of the Mildred Jones estate, he has filed absolutely no such reports. C.P. 65. For him to say that it is undisputed that he and his brother have made “significant capital improvements to land owned by their parents,” is not supported by any documentation filed by Will as required by statute or in response to formal discovery sent to him.

4. Teresa Engbretson and Mary Ann Sealock sought to rescind the 2003 subject documents prior to January 14, 2010. Moreover, their TEDRA petition was timely filed.

While it is true that Teresa and Mary Ann filed their TEDRA petition on January 14, 2010, that does not invalidate their legal

right to challenge the validity of the August 2003 documents and have them found invalid. This issue was initially argued to Judge Gavin as part of the first Motion for Summary Judgment filed by Will Jones. C.P. 295-299. In that motion, there were five issues, one of which was that the claims arising from breach of fiduciary duty, fraud, undue influence and misrepresentation were “time barred.” Judge Gavin denied the Motion for Summary Judgment, including the “time barred” argument. In his Summary Judgment Decision, Judge Gavin said, in relevant part:

Although there is proof of some knowledge in 2003 by Ms. Engbretson and Ms. Sealock of the August documents, material issues of fact exist with regard to when they knew of sufficient facts to discover they had a claim and whether they exercised due diligence to discover the existence of a claim. A review of the evidence does not result in a conclusion that reasonable minds could reach only one conclusion. The motion is denied.

C.P. 16, 438.

Teresa and Mary Ann filed their creditor’s claim on November 29, 2007. Their TEDRA claim relates back to their creditor’s claim. While their rescission claim was first formally raised in the TEDRA petition, that petition is merely an amendment of their creditor’s claim. That is, the TEDRA claims, including rescission, arise out of and are based on the same conduct,

transactions and occurrences as alleged and raised by their creditor's claim. Whenever a claim or defense asserted in an amended pleading arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in an original pleading, the amendment relates back to the original pleading. *Grant v. Morris*, 7 Wn. App. 134, 498 P.2d 336 (1972).

5. Teresa Engbretson and Mary Ann Sealock want to restore the estates and parties to the position they were in before execution of the 2003 subject documents.

What Teresa and Mary Ann want is to restore the estates and the heirs (including Will and Dennis) to the position that existed before Will and Dennis exerted undue influence on their mother in August 2003. Teresa and Mary Ann have received no benefit from the documents signed by their mother. On the contrary, they have been negatively impacted in that the estates were substantially reduced in value. What they are seeking by this action is to reclaim for the estates the assets that were taken from their mother and father's estate by virtue of the undue influence exerted by their brothers.

Will and Dennis have made no request for payments to restore them to whatever position they claim to have been in prior

to the execution of the August 2003 documents, other than their Creditor's Claim. With respect to their Creditor's Claim, see the above comments regarding the withdrawal of that claim. As of this date, Will and Dennis are not asserting a creditor's claim; they are not seeking to be restored to any position that existed prior to August 2003. C.P. 67.

For Will Jones to claim that the five facts "are not in dispute" is absolutely contrary to the record before the court. Moreover, at least two of the claimed "facts" were argued to Judge Gavin who found that there are genuine issues of material fact regarding such. Since there are genuine issues of material fact regarding the five issues that Will Jones claims to be dispositive of the outcome concerning his Motion for Summary Judgment Re: Rescission it was error for Judge Pro Tem Peters to grant the second motion for summary judgment.

D. TERESA ENGBRETSON AND MARY ANN SEALOCK REQUEST AND ARE ENTITLED TO AN AWARD OF ATTORNEY FEES.

RCW 11.96A.150(1) states:

(1) Either the superior court or the court on appeal may, in its discretion, order costs, including reasonable attorney fees, to be awarded to any party: (a) From any party to the proceeding; (b) from the assets of the estate or trust involved in the

proceeding; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs to be paid in such amount and in such manner as the court determines to be equitable.

Teresa Engbretson and Mary Ann Sealock ask this court to award them their attorney fees either against Will Jones personally or from the estates. They have acted, throughout this litigation, to preserve the estates of their parents and to have included in those estates assets that Will and Dennis had their mother gift to them or lease with option to buy on terms favorable to Will and Dennis.

A case discussing an award of fees in a dispute similar to that before this court is the case of *Estate of Cooper*, 81 Wn. App. 79, 913 P.2d 393 (1996). (Although *Estate of Cooper* was decided before the adoption of RCW Chapter 11.96A, the legal analysis applies in this case.) In *Estate of Cooper*, the court awarded attorney fees to the beneficiary of a corpus of a trust who sought to have her father removed as co-trustee of the trust and personal representative of the estate, and an accounting of the trust. 81 Wn. App. at 81. In its opinion, the court said that a court should order costs, including attorney fees, to be paid by any party to the proceedings, or out of the assets of the estate or trust, "as justice may require." *Estate of Cooper*, 81 Wn. App. at 92.

As stated in *Estate of Cooper*, if there is a breach of fiduciary duties, “the plaintiff has a right to recover fees against the trustee personally.” 81 Wn. App. at 92. In this case, Teresa and Mary Ann are seeking to recover assets for the estates based on their brothers exerting undue influence over their mother for the personal benefit of Will and Dennis, with a result that assets of the estates were removed from the estates thereby reducing their values.

Another case discussing an award of attorney fees is *Estate of Ehlers*, 80 Wn. App. 751, 911, P.2d. 1017 (1996). In that case, the plaintiffs were denied their request for attorney fees. However, the court said that “Either the personal representative or the trustee may be required to pay fees and costs of the superior court or court of appeals finds . . . that justice requires it.” 80 Wn. App. at 764. As stated by the court in *Estate of Ehlers*, an award of attorney fees is “left to the discretion of the court.” . . .

As stated in R.A.P. 18.1(a), “If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule.” Teresa and Mary Ann, pursuant to R.A.P. 18.1(a), respectfully

request, on the authorities cited, that they be awarded their attorney fees against Will Jones personally or to be paid from the estates.

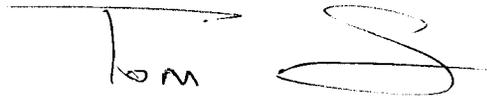
CONCLUSION

Judge Pro Tem Peters erred when he found that Will and Dennis Jones were not in a confidential relationship with and did not exert undue influence on their mother. He erred when he granted the motion for summary judgment re: rescission. Those issues had previously been argued to the court and decided in favor of Teresa and Mary Ann. There are genuine issues of material fact regarding the five facts that Will Jones said are not in dispute. Teresa and Mary Ann are entitled to an award of attorney fees - - either against Will Jones personally or from the estates.

DATED this 23 day of September, 2011.

MINNICK • HAYNER, P.S.

By:



TOM SCRIBNER, WSBA #11285
of Attorneys for Appellant

FILED

SEP 29 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In Re the Estates of

HARVEY L. JONES and
MILDRED L. JONES,

Deceased

TERESA ENGBRETSON and MARY
ANN SEALOCK, heirs of Harvey L.
Jones and Mildred L. Jones,

Appellants,

vs.

WILL L. JONES, personal
representative of the estates of Harvey
L. Jones and Mildred L. Jones,

Respondent.

300081
NO. ~~300439~~

CERTIFICATE OF MAILING

JUDY LIMBURG declares under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. That I am a citizen of the United States, over the age of 18 years, and not a party to this action;
2. That on September 28, 2011 a true a correct copy of **BRIEF OF APPELLANT** was served by the method indicated below, and addressed to the following:

Michael Tabler
Schultheis Tabler Wallace, PLLC
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56 C Street N.W.
Ephrata, WA 98823

First Class U.S. Mail

Jerome R. Aiken
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230 S. Second St.
PO Box 22680
Yakima, WA 98907-2680

First Class U.S. Mail



JUDY LIMBURG

Signed this 28 day of September, 2011
at Walla Walla County, Washington