

FILED

APR 16 2018

No. 355691

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

WASHINGTON STATE COURT OF APPEALS
DIVISION III

AARON L. LOWE, Trustee and Beneficiary of the Donald E. Lowe Trust,
Personal Representative,

Appellant,

vs.

LONNIE D. LOWE, Individually and as Personal Representative of the
Estate of Betty L. Lowe, deceased,

Respondent.

RESPONDENT'S AMENDED BRIEF

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1. Introduction.

This is the third time this dispute – with the same “transactional nucleus of facts” – has come before this Court. This Court previously determined the merits of this case in *In re Estate of Betty Lowe*, 191 Wn. App. 216, 361 P.3d 789 (2015), *review denied*, 185 Wn.2d 1019, 369 P.3d 500 (2016) (“*Lowe I*”), and *In re Estate of Betty Lowe*, No. 34751-6-III, 2018 WL 526720 (Wn. App. January 23, 2018) (“*Lowe II*”). Dissatisfied by the outcome of his first litigation, Appellant Aaron Lowe has now refashioned his initial will contest as a “trust” dispute. Since this alleged “trust” is merely a handwritten note admitted as an exhibit in the Lowe I trial proceedings, which Aaron never previously called a “trust,” Judge Raymond Clary dismissed Aaron’s claims in full on summary judgment, finding that the claims were barred by res judicata and collateral estoppel.¹ Aaron now appeals from this dismissal. As Judge Clary did not err in finding that Aaron’s claims were barred, the summary judgment dismissal of Aaron’s claims should be affirmed.

¹ Subsequent to Aaron’s commencement of this appeal, Judge Clary also imposed sanctions against both Aaron and his attorney, Mr. Robert Kovacevich, under both CR 11 and RCW 4.84.185 for filing and pursuing Aaron’s frivolous lawsuit. (Supp. CP at 838) Judgment was entered against both Aaron and Mr. Kovacevich on January 16, 2018. (Supp. CP at 996) Both Aaron and Mr. Kovacevich filed a notice of appeal of this judgment on January 23, 2018. (2nd Supp. CP at 999)

2. Counterstatement of the Case.

While the Court is generally familiar with the facts of this litigation, and while the record is somewhat lengthy, it is important for this Court to analyze not only the facts of this case, but also the procedural history of several related and dispositive matters to comprehend the abusive litigation that has and continues to occur.

Estate of Betty Lowe (Cause No. 11-4-01394-6)

Betty Lowe died in 2011, leaving a will which left the majority of her estate to Lonnie Lowe, one of her three sons. (Supp. CP at 85)² The will had been executed in 2003, and in 2007 she left written instructions for the distribution of personal property, also primarily to Lonnie. (Supp. CP at 90) Betty Lowe's estate was probated under Cause No. 11-4-01394-6.

In February 2012, Aaron Lowe filed his first action denominated "Verified Petition for a Will Contest," under Cause No. 11-4-01394-6 (the probate file). (Supp. CP at 91) He was represented by Robert Kovacevich.³ (Supp. CP at 99) Ultimately, over the course of the case

² Lonnie is concurrently filing a supplemental designation of clerk's papers, and will supplement the record citations in this brief upon receipt of the supplemental clerk's papers.

³ Mr. Kovacevich continued to represent Aaron Lowe in all phases of litigation outlined below.

and the trial before Judge Moreno, it became clear that one of Aaron's⁴ primary claims revolved around property he claimed his father had amassed, which he claims should have gone to Aaron instead of his mother Betty, and thus Betty's will was subject to contest, as were Lonnie's duties as her personal representative. (*See, e.g.*, Supp. CP at 135-136)

Don Lowe had a will that was executed in 1995. (Supp. CP at 271) He died in 2002. (Supp. CP at 280) In that will, he left his assets to his "personal representative," who he named as Aaron Lowe. (Supp. CP at 272) In the probate of Don's estate, Aaron declined to be named personal representative and filed an affidavit nominating his mother Betty to serve. (Supp. CP at 276) Don's estate was distributed to Betty as the sole heir, and the estate was closed on April 15, 2004, under Cause No. 03-4-01223-0. (Supp. CP at 277)

Betty survived until 2011. (Supp. CP at 282) In her probate, an action filed by Aaron in February 2012 originally challenged her testamentary distribution upon her death, as well as some transfers of personal property, per the written instructions. (Supp. CP at 91) It also challenged Lonnie's conduct as personal representative. *Id.* However, it

⁴ The parties and decedents will be referred to by their first names to avoid confusion.

also included claims that Betty should not have been able to distribute some of her assets, primarily gold and silver, because they belonged to Don's estate, which should have gone to Aaron as personal representative. *Id.* This was largely based on a handwritten letter⁵, undated from Don, indicating Aaron would have responsibility for his mother, and whatever was left after she died should go to Don's three sons. (*See* CP at 13)

On the eve of trial in Betty's "will contest" action, Aaron moved to file a Second Amended and Supplemental Petition which alleged that the Estate of Donald Lowe was erroneously distributed to Betty Lowe. (Supp. CP at 122) The Second Amended and Supplemental Petition in part sought as relief:

1. A determination to subtract assets Betty L. Lowe received from the Estate of Donald E. Lowe...
2. A Declaratory Judgment listing all assets that should have been distributed to Aaron L. Lowe as beneficiary of the Estate of Donald E. Lowe.

Lonnie opposed this motion as futile, in part, since it was an untimely challenge to the distribution of the Estate of Don Lowe. (Supp. CP at 163) The trial court denied Aaron's motion. (Supp. CP at 173)

No disrespect is intended.

⁵ The handwritten letter forms the basis for Aaron Lowe's present action. A copy of the letter is attached as an exhibit to the "Complaint of Trustee to Recovery Trust Assets." CP at 13.

Trial in the matter was held commencing on September 16, 2013. (Supp. CP at 198) At the four-day bench trial, the court heard evidence surrounding the gold and silver collected by Don Lowe, the letter which Aaron now claims created a “trust,” Don’s estate passing to Betty, and Betty’s distribution of the silver and gold both before her death as gifts and in her written instructions. (Supp. CP at 202)

Judge Maryann Moreno issued a Memorandum Opinion on December 16, 2013, and Findings and Conclusions on May 30, 2014.⁶ (Supp. CP at 180) Several of the court’s Findings of Fact outlined Don Lowe’s estate history, and Betty’s entitlement to inheritance of the entirety of Don’s estate. The trial court specifically found:

7. Donald E. Lowe died on April 16, 2003, and a copy of his will dated March 31, 1995 was admitted to probate in Spokane County Superior Court on October 27, 2003.

8. Aaron Lowe, Denise Lowe, and Lonnie Lowe each filed with the court a Declination to serve as personal representatives of the will of Donald E. Lowe. In addition, Aaron Lowe filed an affidavit nominating his mother, Betty L. Lowe, to serve as personal representative of the will of Donald E. Lowe.

12. Donald E. Lowe’s will did not give a definitive direction as to the distribution of his

⁶ After trial, but before the trial court’s ruling, Aaron filed his first petition for discretionary review to the Court of Appeals; it was denied on October 17, 2013. (Supp. CP at 175)

residuary estate. By court order dated October 27, 2003, Donald E. Lowe's residuary estate was to be distributed to his intestate heirs in accordance with the provisions of RCW 11.04.015.

13. Betty L. Lowe was the sole intestate heir of Donald E. Lowe's residuary estate and was entitled to inherit all of Donald E. Lowe's property.

14. Probate of Donald E. Lowe's will was closed on April 15, 2004.

15. Don Lowe executed a pre-death, undated handwritten note to his sons regarding his wishes, but it was not a testamentary document.

In its Conclusions of Law, the trial court found:

22. There is no basis in law or fact to reopen the Estate of Donald E. Lowe, which issue has previously been denied by the Court.

(Supp. CP at 180)

Final judgment was entered against Aaron in this case on May 30, 2014, in the amount of \$46,376.00, which represented attorney fees incurred in the matter. (Supp. CP at 226, 228)

Lowe I Appeal

Aaron filed a Notice of Appeal of this decision on January 7, 2014, and an Amended Notice of Appeal on September 17, 2014. (Supp. CP at 337, 354) His assignments of error in that appeal included claims that the trial court erred by not allowing the Second Amended Complaint; that the trial court erred in not holding Aaron had inherited from his father's will;

that the trial court erred in failing to find evidence relevant to prove Aaron inherited from his father and allowing Betty's estate to claim those assets; and that insufficient evidence existed to support Conclusion of Law 22 cited above. (Supp. CP at 373-376) His appeal argued about the distribution of Don's estate at length. (Supp. CP at 379-383)

Estate of Donald Lowe (Cause No. 03-4-01223-0)

On September 9, 2014, while the appeal of his action in the Estate of Betty Lowe was pending, Aaron filed a new action in the Estate of Donald Lowe file, Cause No. 03-4-01223-0, as "personal representative" and "beneficiary" seeking to reopen the Estate of Donald E. Lowe and redistribute his estate assets. (Supp. CP at 280) Lonnie responded on September 18, 2014, noting collateral estoppel and the statute of limitations barred the petition seeking to reopen Donald E. Lowe's estate. (Supp. CP at 289) That matter was preassigned to Judge Moreno. (Supp. CP at 298) On September 17, 2014, Aaron filed an Amended Notice of Appeal in Betty's probate/will contest action, which included a request for review of the court's failure to allow the Second Amended Supplemental Petition and "the failure to reopen the estate or correct the inventory of Donald E. Lowe." (Supp. CP at 234) As a result, Lonnie filed a response to the new action (Cause No. 03-4-01223-0), noting that the issue was on appeal, and that the superior court had lost jurisdiction on the matter.

(Supp. CP at 289) Aaron took no additional action on it while the appeal was pending.

This Court issued its opinion in the Estate of Betty Lowe matter on November 10, 2015, finding Aaron was not entitled to any of the relief he sought, and specifically affirming the court's denial of the leave to amend to add claims regarding Don Lowe's estate assets. *In re Estate of Lowe*, 191 Wn. App. 216, 361 P.3d 789 (2015). Aaron filed a Petition for Review of this decision in the Supreme Court, which was denied on April 27, 2016. *Lowe v. Lowe*, 185 Wn.2d 1019 (April 27, 2016).

Then, on June 16, 2016, Aaron filed a reply to Lonnie's response in Cause No. 03-4-01223-0, which had been filed almost two years before. (Supp. CP at 302) He also filed an "Amended Petition" in that action to reopen the Estate of Donald E. Lowe on September 16, 2016. (Supp. CP at 308) Aaron inexplicably noted the petition for "hearing," not in front of Judge Moreno, the assigned judge, but rather in the presiding department. Id. Lonnie opposed such hearing on September 20, 2016. (Supp. CP at 333) Aaron responded by filing an Affidavit of Prejudice against Judge Moreno (to which Lonnie objected), and no further action has been taken or set in that case. (Supp. CP at 300)

Lowe II Appeal

A Final Report and Petition for Distribution of Betty's Estate was filed on August 3, 2016. (Supp. CP at 237) Aaron filed a motion to continue that hearing, again claiming status as a beneficiary and trustee of the Donald Lowe "trust," and later sought to stay the closure of the Betty Lowe Estate based on the repeated claims that gold and silver in the Estate of Betty Lowe were the assets of Donald Lowe and subject to a "trust." (Supp. CP at 254) The trial court, Judge Moreno, denied the motion to continue and entered an Order approving the Final Report on August 26, 2016. (Supp. CP at 258) Aaron filed a new Notice of Appeal of the Final Report in Betty's probate on September 16, 2016. (Supp. CP at 260) That appeal was briefed, and this Court again affirmed Judge Moreno, this time with regard to her order approving the final report and petition for decree of distribution in Betty's estate. *See Lowe II.*

Lowe v. Lowe (Cause No. 16-4-01072-7) – "Lowe III"

Finally, Aaron brought the present action claiming the existence of a "trust" containing his father's assets. Lonnie filed a motion to dismiss, which was converted to a motion for summary judgment, seeking a dismissal of Aaron's claims. (CP at 15-31) The trial court, Judge Raymond Clary, issued a letter ruling filed July 11, 2017, dismissing Aaron's claims in full and with prejudice. (CP at 51-53) Judge Clary,

after reviewing more than 600 pages of documents from this case and the prior litigation, determined:

Aaron's primary theory is that the 2003 probate and the trial in Estate of Lowe did not probate or adjudicate whether a heartfelt handwritten letter from Aaron and Lonnie's father was in fact and in equity a trust document which should have resulted in Aaron receiving his father's accumulation of gold and silver, among other relief.

CP at 51.

The trial court found that Lonnie had properly established that there was "no genuine issue of material of fact that *In Re Estate of Lowe* supports claim preclusion and issue preclusion and therefore Defendant Lonnie Lowe's motion [for summary judgment] must be granted." (CP at 52). The trial court entered an order dismissing Aaron's claims (CP at 57-58), findings of fact and conclusions of law on the frivolity of Aaron's and his counsel's complaint (Supp. CP at 815), findings of fact and conclusions of law on the appropriateness of an award of attorneys' fees (Supp. CP at 831), an order awarding Lonnie his attorneys' fees and costs under RCW 4.84.185 and CR 11 (Supp. CP at 843), and a final judgment (Supp. CP at 996).

The court's award of fees was made against both Aaron and Mr. Kovacevich because, as the court found and concluded: Aaron's lawsuit was frivolous, as the re-litigation of identical issues was not well-

grounded in fact nor warranted by existing law or a good-faith argument for altering existing law; both Aaron and his counsel failed to conduct proper legal and factual investigation prior to bringing Aaron's claims; they knew or should have known that Aaron's claims would be barred by collateral estoppel and res judicata; they knew or should have known that Aaron's lawsuit was brought for an improper purpose of harassing Lonnie. (Supp. CP at 815). Aaron now appeals the trial court's dismissal of this current iteration of his legal theories.

3. Legal Argument.

3.1. Standard of review.

Summary judgment dismissals are reviewed de novo. *Anderson Hay & Grain Co. v. United Dominion Indus., Inc.*, 119 Wn. App. 249, 254, 76 P.3d 1205, 1207 (2003). Standing in the shoes of the trial court, the court of appeals must affirm summary judgment if, construing all facts and reasonable inferences in the light most favorable to the nonmoving party, there exist no issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c).

3.2. The trial court did not err in dismissing Aaron's complaint on the basis of claim preclusion and issue preclusion.

Aaron's assignments of error 1, 2, 4, 5, and 6 all address the same question: whether Judge Clary erred in concluding that Aaron's claims in

the present litigation are barred by the doctrines of collateral estoppel and res judicata.

Law and equity prohibit the repetitive filing of claims previously adjudicated and unsuccessfully appealed. *Yurtis v. Phipps*, 143 Wn. App. 680, 696, 181 P.3d 849 (2008) (court affirmed CR 12(b)(6) dismissal of fourth attempt to overturn decade-old ruling on basis of res judicata and collateral estoppel, awarded fees and sanctions, and entered an order precluding any additional filing of repetitive claims). A litigant may not simply continue to rename or refashion a cause of action and engage in multiple, and substantially identical, lawsuits with the hope of finding a favorable judge. “In determining whether there is identity of causes of action, res judicata applies to what might or should have been litigated as well as what was litigated.” *Lowe II*, 2018 WL 526720 at *4 (citing *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983)).

Res judicata and collateral estoppel are appropriate bases for summary dismissal. *Yurtis*, 143 Wn. App. at 696; *Deja vu-Everett-Federal Way v. City of Federal Way*, 96 Wn. App. 255, 263, 979 P.2d 464 (1999); 61A Am.Jur.2d Pleading §334; see also *Chester v.*

Washington State Dept. of Corrections, 2011 WL 4553170 at *3 (Wn. App. Oct. 4, 2011)⁷.

Collateral estoppel, or issue preclusion, prevents litigation of an issue after the party estopped has already had a full and fair opportunity to present its case. *Pederson v. Potter*, 103 Wn. App. 62, 69, 11 P.3d 833 (2000). Collateral estoppel bars re-litigation of an issue if (1) the issue presented is identical to the issue presented in the prior suit; (2) there was a final judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party in the former litigation; (4) no injustice will result from applying the doctrine. *Deja vu-Everett-Federal Way*, 96 Wn. App. at 258.

Similarly, the purpose of the doctrine of res judicata (claim preclusion) is to avoid re-litigation of a claim or cause of action. *Id.* at 262. Under res judicata, the party is barred from presenting all grounds of recovery that could have been presented in a previous action, whether they were or not, if the previous action was a suit between the same parties and the same cause of action and concluded in a final judgment of the merits. To determine whether the same cause of action was involved, four criteria

⁷ Lonnie acknowledges that this decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as this Court deems appropriate. GR 14.1.

are considered: (1) whether rights or interest established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same rights; and (4) whether the two suits arise out of the same transactional nucleus of facts. *Id.*

In this instance, the pleadings before this Court establish that Aaron's current claim has been raised and decided multiple times in related matters, and as decided below, establish that Aaron has no basis to pursue an action to reopen his father's long-closed estate, which he now terms a "trust" dispute. Judge Clary made specific findings on this:

19. Aaron Lowe filed a Summons and a Verified Petition for Will Contest and other causes of action against Respondent Lonnie Lowe, individually, and as Personal Representative of the Estate of Betty Lowe, deceased on February 22, 2012.

21. Aaron Lowe claimed that property in Donald Lowe's estate should have gone to Aaron Lowe instead of Betty Lowe.

24. Aaron moved to file a Second Amended and Supplemental Petition on August 23, 2013. The Second Amended and Supplemental Petition, as well as the attendant motion for leave to file and memorandum in support, were prepared and signed by Mr. Kovacevich, and were not signed or verified by Aaron Lowe.

25. Among other things, the Second Amended and Supplemental Petition sought "[a] determination to subtract

assets Betty L. Lowe received from the Estate of Donald E. Lowe...” and “[a] declaratory judgment listing all assets that should have been distributed to Aaron L. Lowe as beneficiary of the Estate of Donald E. Lowe.” The trial court denied the motion as an untimely challenge to the distribution of the Estate of Donald Lowe.

26. A four-day bench trial in the matter was held commencing on September 16, 2013, before Judge Maryann Moreno.

27. In its Findings and Conclusions entered May 30, 2014, the trial court found that probate of Donald Lowe’s Will was closed on April 15, 2004, and concluded that there was no basis in law or fact to reopen the Estate of Donald Lowe, which issue had previously been denied by the Court.

28. Final judgment was entered against Aaron Lowe in this case on May 30, 2014, in the amount of \$46,376.00, which represented attorney fees incurred in the matter.

...

42. Aaron Lowe filed yet another lawsuit – the instant case – claiming the existence of a “trust” containing his father’s assets on July 26, 2016. The Complaint of Trustee to Recover Trust Assets was signed by both Aaron Lowe and Mr. Kovacevich.

47. Plaintiff Aaron Lowe’s claims in the present action have previously been litigated in Spokane County Superior Court Cause No. 11-4-01394-6 (the Estate of Betty Lowe), rendering his complaint devoid of any claim upon which relief can be granted.

48. Aaron Lowe’s claims regarding Donald Lowe’s Estate, including the alleged “trust,” were also raised in Aaron’s Amended Petition to Reopen the Estate of Donald Lowe (Cause No. 03-4-01223-0), which Aaron has let lie dormant for more than a year, and Aaron’s multiple appeals in the Estate of Betty Lowe.

49. Aaron has already had a full and fair opportunity to present his case in the Estate of Betty Lowe.

50. Aaron was a party in the Estate of Betty Lowe. The issues presented by Aaron in the instant case are identical to the issues presented in his prior lawsuit in the Estate of Betty Lowe. A final judgment was entered on the merits against Aaron in the Estate of Betty Lowe.

51. Aaron Lowe's claims are barred by the doctrine of collateral estoppel. No injustice will result in applying the doctrine of collateral estoppel, as it is Aaron's and his counsel's frivolous actions that are causing prejudice to Lonnie Lowe.

52. Aaron is barred from presenting all grounds of recovery in the instant case that could have been presented in the Estate of Betty Lowe, as the Estate of Betty Lowe was a suit between the same parties and the same cause of action, and the Estate of Betty Lowe resulted in a final judgment on the merits.

53. Aaron's claims are barred by the doctrine of res judicata.

...

55. As Aaron Lowe's present claims are barred by collateral estoppel and res judicata, Aaron's claims have no chance of success, and there exists no basis in fact or law for Aaron's claims.

Both claim and issue preclusion bar this suit as a matter of law. Aaron's redundant claims have already been litigated and unsuccessfully appealed. There is no question that Aaron was involved in the probate of the Estate of Donald E. Lowe, a party to the probate of the Estate of Betty Lowe, and a party to his will contest case. Judge Moreno specifically heard argument and testimony on the estate assets of Donald E. Lowe,

whether Betty's estate contained those assets, and if they were properly distributed. Judge Moreno heard Aaron's eleventh-hour request to reopen Don Lowe's Estate and denied the same. She ruled "there is no basis in law or fact to reopen the estate of Donald E. Lowe."⁸ (Supp. CP at ___) Aaron appealed this issue, among others, and was unsuccessful. It is clear that the rights and interests already established would be re-litigated in this litigation, and substantially the same evidence necessary, infringement of the same right, and all the same transactional nucleus of facts. Therefore, the law and facts have been argued and finally decided in the probate of Betty Lowe's Estate.

There is little question that the court's Finding of Fact and Conclusions of Law in relation to the original action in Betty's estate established all the issues relative to a claim that Don Lowe's estate should be re-opened, that he somehow had intended his assets to go to someone other than Betty, and that the assets should not have passed to Betty and then to Betty's estate. These issues have not only been litigated, but appealed and rejected. The only injustice that would result here is if

⁸ While Aaron's petition to reopen the Estate of Donald E. Lowe remains open and assigned to Judge Moreno, Aaron and his counsel filed this new action apparently in the hope of judge shopping, knowing that Judge Moreno's familiarity with the cases and previous orders would lead to dismissal. The same result should attach here.

Lonnie is required to re-litigate these issues more than 10 years after his father's estate was closed.

3.3. The trial court did not improperly shift the burden of proof to Aaron.

Aaron's third assignment of error alleges that Judge Clary "fail[ed] to place the burden of proof to prove res judicata or issue preclusion on Lonnie." Aaron provides no record citation, or any other evidence, to support this contention. On summary judgment, the initial burden is on the moving party to show there is no dispute about any issue of material fact; however, once that burden is met, the burden **shifts** to the non-moving party. See CR 56; *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992). A party defeats summary judgment only by coming forth with evidence that there exists a genuine issue of a material fact for trial. CR 56. A party resisting summary judgment cannot satisfy this burden on the basis of conclusory allegations, speculative statements, or argumentative assertions. *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992).

Judge Clary carefully considered more than 600 pages of materials from this case and Aaron's prior related cases, and concluded that Lonnie had properly established that there was "no genuine issue of material of fact that *In Re Estate of Lowe* supports claim preclusion and issue

preclusion and therefore Defendant Lonnie Lowe's motion [for summary judgment] must be granted." (CP at 52) Lonnie having met his initial burden, Aaron did not come forward with any evidence that would create a genuine issue of material fact that his claims were not barred. Judge Clary properly applied the rules of summary judgment to find that Lonnie was entitled to judgment as a matter of law based on the estoppel effect of Aaron's prior litigation. The court did not improperly shift the burden to Aaron.

3.4. Aaron cannot now reframe his prior litigation in terms of a "trust"⁹ or by invoking Donald Lowe's Estate to avoid the preclusive effect of the earlier judgment.

Aaron's assignments of error 7-10 are all variations on Aaron's new argument that the alleged "trust" was not a party in Aaron's prior litigation, and therefore res judicata and collateral estoppel cannot apply. Aaron's logic is fundamentally flawed, as the new articulation of a "trust" is merely a refashioning of the exact same claims that Aaron already raised and sought to include by way of his proposed Second Amended and Supplemental Petition in his initial litigation. As Aaron sought leave to file it on the eve of trial, Judge Moreno properly denied Aaron's request

⁹ Without assigning specific error, Aaron's opening brief argues a red-herring issue about federal gift taxes having been "avoided or evaded" to date. (Appellant's Brief at 30-31) While the purpose of this argument is unclear, it is irrelevant and cannot be considered as part of this appeal as the issue was never raised below. RAP 2.5.

for leave to supplement. This Court affirmed as much in *Lowe I*, and again just recently in *Lowe II*.

Moreover, to the extent Aaron now argues the existence of a “trust,” that theory is one that could have and should have been raised in the Estate of Betty Lowe litigation. As this Court stated in *Lowe II*, “In determining whether there is identity of causes of action, *res judicata* applies to what might or should have been litigated as well as what was litigated.” 2018 WL 526720 at *4. And just as in *Lowe II*, this Court’s decision in *Hadley v. Cowan*, 60 Wn. App. 433, 804 P.2d 1271 (1991), is instructive:

In *Hadley*, this court held that following the conclusion of a will challenge, an action by beneficiaries of an estate that alleged undue influence, abuse of confidence, fraud, and substitution of one will for another “are of a **single ‘transactional nucleus of facts’ that could and should have been determined in the probate challenge.**” The damages in both proceedings “are substantially the same and are intimately related in time, origin, and motivation, because they arise out of the same interactions between the deceased and the respondents,” and, “[i]t is also obvious that the claims in the present proceedings would have constituted a convenient trial unit in the probate proceeding.

Lowe II, 2018 WL 526720 at *4 (quoting *Hadley*, 60 Wn. App. at 442-43 (internal citations omitted, emphasis added)).

Here, Aaron’s attempt to re-articulate his prior claims in terms of a “trust” are simply an alternative theory that he could have and *should* have

raised in his initial challenge to the Betty Lowe probate. Aaron seeks to avoid the preclusive effect of his prior litigation by arguing that there could not be an identity of parties, as he is now acting as “trustee” of a “trust,” and “[t]he trust avoid probate.” (Appellant’s Brief at 6) This shape-shifting exercise is precisely the sort of artistic pleading the doctrines of res judicata and collateral estoppel seek to avoid. No new facts have arisen since *Lowe I* that would support Aaron’s claim of a “trust” created by Don Lowe’s handwritten note. Aaron had Don Lowe’s note in the *Lowe I* litigation, admitted he had knowledge of it in his “Second Amended and Supplemental Petition” in *Lowe I*, and in fact used it as an exhibit at that trial. (Supp. CP at 124). Aaron’s eleventh-hour attempt to amend his pleadings before trial was properly denied. *Lowe I*, 191 Wn. App. at 227-28. Aaron cannot now come back years later and argue that his father’s handwritten note now creates a “trust” that avoids not only probate, but also the rules of civil procedure.

For the same reasons articulated by Judge Clary, and as affirmed by this Court in *Lowe I* and *Lowe II*, Aaron’s efforts are too little too late; if Aaron was not able to cure his untimely supplementation of theories or claims on the eve of trial, he certainly cannot be allowed to do so years later.

3.5. Lonnie is entitled to his reasonable attorneys' fees and costs incurred in this appeal.

Lonnie requests that this Court award him his reasonable attorneys' fees and costs incurred in responding to Aaron's appeal, pursuant to both RAP 14.2 and RAP 18.9. The appellate courts may order payment of terms or compensatory damages by a party or counsel who uses the appellate rules for the purpose of delay, files a frivolous appeal, or fails to comply with the appellate rules. RAP 18.9(a). The appellate court may also condition a party's right to participate further in the review on compliance with terms of an order or ruling, including payment of an award which is ordered paid by the party. *Id.*

An appeal is frivolous if, considering the entire record and resolving all doubts in favor of the appellant, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal. *Ramirez v. Dimond*, 70 Wn. App. 729, 734, 855 P.2d 338 (1993). An appeal that presents only claims and issues that have been barred by collateral estoppel and res judicata is so devoid of merit that there is no possibility of reversal. *See Yurtis*, 143 Wn. App. at 697.

In *Griffin v. Draper*, 32 Wn. App. 611, 616, 649 P.2d 123 (1982), the court found that an appeal presented no debatable issues and was

devoid of merit when it was “evident from the record that the purpose of the appeal was to re-litigate [a prior lawsuit].” Id. In so finding, the court noted that the appellants were merely using the appellate rules for delay. Id.

As in *Griffin*, Aaron’s present appeal is nothing more than an attempt to re-litigate issues that have already been fully adjudicated. The appeal presents no debatable issues, is devoid of merit, and is therefore frivolous. *Id.*; *Deja vu-Everett-Federal Way*, 96 Wn. App. at 264 (trial court abused its discretion in failing to award city its reasonable fees and costs where action was frivolous under CR 11 and RCW 4.84.185; remanding for award of both trial-court and appellate-court fees and costs); *see also Phillips v. Valley Commc’ns, Inc.*, 2010 WL 5394783 at *11 (2010) (finding appeal frivolous and contrary to doctrines of collateral estoppel and res judicata, awarding fees under RAP 18.9)¹⁰. Because Aaron Lowe’s appeal is frivolous, and as he is using the appellate rules and process for the sole purpose of delaying finality to this serial litigation, Aaron should be ordered to pay Lonnie’s reasonable attorneys’ fees and costs incurred in responding to this appeal.

¹⁰ Lonnie acknowledges that this decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as this Court deems appropriate. GR 14.1.

4. Conclusion.

Aaron's trilogy of appeals stemming from the litigation of his mother's estate must come to a close. Judge Clary was correct in dismissing Aaron's present case as being barred by collateral estoppel and res judicata. This is precisely the type of case such doctrines seek to preclude. For the foregoing reasons, Aaron's appeal should be denied and the trial court's entry of summary judgment affirmed, with an award of reasonable fees and costs on appeal to Lonnie.

DATED this 16th day of April, 2018.


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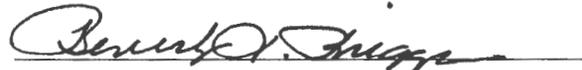
CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 16th day of April, 2018, at Spokane, Washington, the foregoing was caused to be served on the following person(s) in the manner indicated:

Aaron L. Lowe, pro se
1408 W. Broadway
Spokane, WA 99201

VIA REGULAR MAIL	<input checked="" type="checkbox"/>
VIA CERTIFIED MAIL	<input type="checkbox"/>
HAND DELIVERED	<input checked="" type="checkbox"/>
BY FACSIMILE	<input type="checkbox"/>
VIA FEDERAL EXPRESS	<input type="checkbox"/>
VIA REGULAR MAIL	<input type="checkbox"/>
VIA CERTIFIED MAIL	<input type="checkbox"/>
HAND DELIVERED	<input checked="" type="checkbox"/>
BY FACSIMILE	<input type="checkbox"/>
VIA FEDERAL EXPRESS	<input type="checkbox"/>

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