

**FILED**

No. 359301

OCT 15 2018

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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RANDALL I DANSKIN, P.S

RESPONDENT

vs.

NANCY TAORMINA

APPELLANT

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**BRIEF OF RESPONDENT RANDALL | DANSKIN, P.S.**

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## I. INTRODUCTION

In November, 2015, Appellant Nancy Taormina hired attorney Michael L. Wolfe of Respondent Randall | Danskin to represent her in a guardianship action for her elderly father. Ms. Taormina gave Mr. Wolfe a retainer at the outset. Throughout the guardianship litigation Ms. Taormina was provided with monthly statements that showed her legal fees and costs as they accrued. Ms. Taormina paid some but not all of those costs and fees. She did not complain about the bills or dispute them as the guardianship proceeded. At the conclusion of the successful guardianship proceeding, Ms. Taormina instructed Mr. Wolfe to seek reimbursement of her costs and fees from her father's estate. The trial court judge entered an order deciding that the amount of her costs and fees was reasonable, but declining to assess them against her father's estate. That order concluded the guardianship action. Thereafter, and when she no longer needed a lawyer, Ms. Taormina refused to pay the balance of her bill, claiming it was more than she wanted to pay.

Months later Randall | Danskin filed suit against Ms. Taormina in Stevens County, where she resides, to collect the unpaid balance of her bill. The Stevens County Superior Court granted Randall | Danskin's summary judgment, which was reduced to a judgment. Ms. Taormina's motion for reconsideration was denied, and she filed this appeal.

## **II. ISSUE PRESENTED/ASSIGNMENTS OF ERROR**

The trial court properly granted summary judgment in favor of Randall | Danskin because the material facts were admitted, and Ms. Taormina was estopped from disputing the balance of her bill.

## **III. ISSUES PERTAINING TO ISSUES PRESENTED/ ASSIGNMENTS OF ERROR**

1. Ms. Taormina is judicially estopped from disputing her debt to Randall | Danskin;
2. Ms. Taormina is collaterally estopped from disputing her debt to Randall | Danskin;
3. Ms. Taormina's arguments failed to raise material issues of fact on Randall | Danskin's theories of recovery;
4. Randall | Danskin is entitled to attorney's fees on appeal.

## **IV. STATEMENT OF THE CASE**

In November 2015 Ms. Taormina hired attorney Michael L. Wolfe to represent her because she was being prevented from visiting her elderly father, who was in an assisted living facility in Spokane. See CP 3-4 at ¶ 4; CP 30 at ¶ 4. Ms. Taormina provided Randall | Danskin with a retainer against which her costs and fees were billed. CP 157; 162-3. In Court proceedings, Ms. Taormina has characterized her initial payment as a "retainer," not a flat fee. RP 4 ll. 12-13.

On December 3, 2015, Ms. Taormina filed a petition in Spokane County Superior Court seeking appointment as the guardian of the person and of the estate of her father, John Sr. CP 4 at ¶ 5; CP 30 at ¶ 5.

In her guardianship petition Ms. Taormina alleged that John Sr. was incapacitated as to his person and his estate; required a full guardian of his person and his estate; and that the powers of attorney previously executed by John Sr. naming John Jr. as attorney in fact were not an appropriate substitute for the guardianship, and should be voided. CP 4 at ¶ 5; CP 30 at ¶ 5.

John Sr. and John Jr. both opposed the guardianship, arguing that John Jr. should remain the attorney in fact for John Sr. and that the guardianship was unnecessary and should be dismissed. CP 4 at ¶ 6; CP 30-1 at ¶ 6.

As part of the guardianship proceedings, the Spokane County Superior Court appointed a Guardian ad Litem (GAL). The GAL conducted an investigation and filed a report recommending the appointment of James P. Spurgetis, a Certified Professional Guardian (“CPG”), for the person and of the estate of John Sr. CP 4 at ¶ 7; CP 31 at ¶ 7; CP 50 at ¶ 7; CP 55; 57.

John Jr. and John Sr. opposed the GAL’s recommendation; neither wanted a guardianship for John Sr. John Jr. also contended that if the Court appointed a guardian, it should be him. CP 4 ¶ 8; CP 31 at ¶ 8.

Ms. Taormina wanted to be her father's guardian, so she proceeded to trial, which took four days in Spokane County Superior Court before the Honorable James M. Triplet. CP 4 at ¶ 9; CP 31 at ¶ 9. Ms. Taormina was told months before trial that it would be difficult to overcome the GAL's recommendation of a CPG. CP 50 at ¶ 9; 58.

On December 5, 2016, Judge Triplet read his lengthy oral decision in open court. He explained why he would not appoint Ms. Taormina as John Sr.'s guardian. It was his conclusion after weighing the evidence that Ms. Taormina was antagonistic towards her siblings and her father's care givers, (CP 65-6), and that antagonism had resulted in two restraining orders against her. CP 66. The Court concluded that Ms. Taormina had assaulted her brother in her father's presence, and also had been hostile towards neighbors and other individuals. CP 62; 65. Ms. Taormina denied these allegations, but the Court specifically held that independent witnesses testified otherwise, and she was not a credible witness. CP 64-5. Thus, the Court's decision not to appoint Ms. Taormina was consistent with the GAL's recommendation and the result of Ms. Taormina's actions.

On January 26, 2017, the Court entered the order granting the guardianship petition. The Court concluded that John Sr. was incapacitated; needed a full guardian of his person and of his estate; that the powers of attorney previously signed by John Sr. were not an acceptable alternative to

the guardianship and were void; that John Jr. did not understand his role as a fiduciary or the responsibilities of a fiduciary; and that John Jr.'s management of John Sr.'s estate was not consistent with John Jr.'s responsibilities as a fiduciary. Accordingly, the Court refused to appoint him as John Sr.'s guardian. See CP 4 at ¶ 10; CP 13; CP 31 ¶ 10. As the GAL had recommended, the Court appointed Mr. Spurgetis as John Sr.'s guardian. CP 15. The order also preserved Ms. Taormina's ability to visit her father, which was her primary concern. CP 14.

Thereafter, and at Ms. Taormina's instruction, her counsel sought reimbursement of her costs and fees from the estate of John Sr., but that discretionary motion was denied by order entered February 20, 2017. CP 23-26; CP 51 at ¶ 14; CP 175-6 at ¶ 1; CP 178. When the motion was filed Ms. Taormina was provided with a copy of the paperwork including her counsel's fee affidavits outlining the costs and fees she had incurred. CP 51 at ¶ 14-15; 68. Attached to the fee affidavits were prior bills and other billing information regarding the fees. *Id.* At no time prior to the hearing did Ms. Taormina dispute any of the costs and fees she had incurred or any of the unpaid costs and fees which already had been billed to her. *Id.*

Like every other issue in the guardianship, the fees of the various attorneys (counsel for petitioner Nancy Taormina, independent counsel for John Sr., and counsel for John Jr.), were disputed. The parties opposed each

other's motions for reimbursement of fees from the estate. Ms. Taormina successfully argued that independent counsel for her father charged an hourly rate that was too high, and she also successfully opposed reimbursement of John Jr.'s fees from the estate of her father. CP 197-205. Thus, the reasonableness of Ms. Taormina's fees was litigated and decided by the Court. In his order Judge Triplet specifically found that Ms. Taormina's fees, which then totaled \$33,109.00, were reasonable in amount. CP 5 at ¶ 11; CP 23; CP 32 at ¶ 11. The Court's ruling on the issue of fees concluded the guardianship litigation.

During the guardianship Ms. Taormina was billed on a monthly basis for the costs and fees incurred on her behalf, and she paid costs and fees totaling \$19,638.23. She did not dispute any of the charges on any of the bills until after the Court declined to reimburse them from her father's estate. CP 51 at ¶ 13. Ms. Taormina repeatedly promised to pay the balance of her bill, and she knew there was no guarantee that her costs and fees would be reimbursed from John Sr.'s estate. CP 5 at ¶ 12; CP 51 at ¶ 14; CP 68; CP 157.

After the Court denied her motion for reimbursement of costs and fees, and when she no longer needed a lawyer, Ms. Taormina suggested she would pay about half of her outstanding bill, but then subsequently refused to pay any of it. CP 5 at ¶ 13; CP 33 at ¶ 13.

In September 2017 Randall | Danskin filed suit against Ms. Taormina in Stevens County Superior Court to recover the unpaid balance of Ms. Taormina's bill, and in December 2017 Randall | Danskin moved for summary judgment. CP 39. In opposition Ms. Taormina argued she should not have to pay the balance of her bill because it was too much, and more than the \$5,000 she was willing to pay. However, her opposition included most of her monthly bills and correspondence asking her to replenish the retainer she had provided when she hired Mr. Wolfe in November 2015. CP 157-68. Furthermore, she had already paid more than \$5,000. CP 51 at ¶ 13. At the summary judgment hearing on February 2, 2018, Ms. Taormina characterized the initial amount she paid as a retainer, not a pre-paid flat fee. RP 4, ll. 12-13.

At the summary judgment hearing the Court asked Ms. Taormina to confirm she was not disputing she had "retained an attorney and incurred attorney's fees, but rather it's the amount of the attorney fees you are disputing." Ms. Taormina agreed, responding that she disputed "the amount, and also that he [Mr. Wolfe] didn't advocate for me." RP 3. The Court explained to Ms. Taormina that the fee amount and its reasonableness had already been decided by the Spokane County Superior Court and that the Stevens County Superior Court could not and would not overturn that order. RP 3-5.

The Court granted Randall | Danskin's motion at the hearing, (CP 212-13), and entered judgment against Ms. Taormina that same day. CP 214-15. The judgment amount represented the balance due as of the Spokane County Superior Court ordered entered February 20, 2017, plus statutory costs from the Stevens County action. RP 11-13. Ms. Taormina does not dispute the accuracy of the Court's arithmetic.

Thereafter, Ms. Taormina filed a motion for reconsideration (CP 187-91), but that motion was denied. CP 206. At the hearing the trial court again explained why it granted the summary judgment motion. RP 20-4. Ms. Taormina appealed. CP 209-11.

## **V. ARGUMENT**

### **A. Standard of Review.**

The standard of review in a motion for summary judgment is *de novo*. *Allen v. State*, 118 Wn.2d 753, 757, 826 P.2d 200 (1992).

An Appellate Court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it. *LaMon v. Butler*, 112 Wn.2d 193, 200-1; 770 P.2d 193 (1989).

### **B. Ms. Taormina is judicially estopped from disputing her debt to Randall | Danskin.**

Ms. Taormina agreed that she hired counsel and incurred costs and

fees. After the guardianship litigation had concluded, she objected to the outstanding balance of her bill because it was more than she wanted to pay, and she no longer needed a lawyer. However, after the guardianship order was entered she filed a motion seeking reimbursement of her bill from her father's estate, arguing she had incurred a specific amount of costs and fees, and that amount was reasonable. She prevailed on that argument and the Spokane County Superior Court agreed with that argument. Accordingly, Ms. Taormina is judicially estopped from disputing that she hired an attorney; incurred costs and fees in a specific amount; and that amount was reasonable. The total, reasonable amount necessarily included her unpaid balance.

In *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 28 P.3d 832 (2001), the Court held that “judicial estoppel precludes a party from gaining an advantage from taking one position and then seeking a second advantage by taking an incompatible position in a subsequent action.” *Id.* at p. 906. Judicial estoppel applies when a litigant's prior inconsistent position benefited the litigant or was accepted by the Court. *Id.* at p. 909.

In the trial court and on appeal Ms. Taormina suggests she was dissatisfied with the outcome of the guardianship and does not want to pay because she was not appointed as the guardian for her father. Appellant's Brief at pp. 16; 18. However, the Court's decision to appoint a specific

CPG was consistent with the recommendation of the GAL, and selection of the guardian is vested in the discretion of the Superior Court. RCW 11.88.010(1). (“The Superior Court of each county shall have power to appoint guardians for the persons and/or estates of incapacitated persons ... .”) There was no guarantee she would be appointed, and no possibility of such a guarantee. Ms. Taormina was told months before trial that it would be difficult to overcome the GAL’s recommendation. Furthermore, Judge Triplet explained that his decision not to appoint her was because of her own actions.

In the Stevens County proceeding and on appeal Ms. Taormina disputes some of the charges from her bills. Appellant’s Brief at pp. 19-22. But as the Stevens County Superior Court explained to her, she had previously argued in the Spokane County guardianship that she had hired an attorney, had incurred those attorney’s fees, and they were reasonable. She prevailed on that argument and the Spokane County Superior Court accepted it, so the Stevens County Superior Court would not and could not revisit the issue. RP 3-5.

**C. Ms. Taormina is collaterally estopped from disputing her debt to Randall | Danskin.**

Ms. Taormina agreed that she hired counsel and incurred costs and fees. After the guardianship litigation concluded and she no longer needed

a lawyer, she objected to the balance of her bill, but she is collaterally estopped from disputing her debt. The collateral estoppel doctrine precludes litigation of issues that were litigated and determined in an earlier proceeding. *Christensen v. Grant County Hosp. Dist. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). The party asserting collateral estoppel must establish that (1) the issue decided was identical to the issue presented in the subsequent action; (2) the prior action ended in a final judgment on the merits; (3) the party to be estopped was a party or privity with a party in the prior action; and (4) application of the doctrine would not work an injustice. *Id.*

The amount and reasonableness of Ms. Taormina's attorney's fees were decided by Judge Triplet in his order entered February 20, 2017. Judge Triplet's decision on Ms. Taormina's fees was not appealed and was final in September 2017 when Randall | Danskin filed suit against Ms. Taormina. Ms. Taormina was a party to the prior guardianship action, and payment of the fees for which she sought reimbursement and which were approved by the Spokane County Superior Court does not work an injustice. Thus, based on collateral estoppel, the Stevens County Superior Court correctly refused to re-litigate issues decided by Judge Triplet in the guardianship action.

**D. Ms. Taormina's arguments failed to raise material issues of fact on Randall | Danskin's theories of recovery.**

Regardless of whether Ms. Taormina was judicially or collaterally estopped, summary judgment was proper on the basis of theories of recovery alleged by Randall | Danskin.

Ms. Taormina admits she hired counsel to represent her to initiate a guardianship action in Spokane County Superior Court. Ms. Taormina filed a motion to recover her fees and costs from her father's estate, representing to the Court that she had incurred costs and fees in a specific amount, which was reasonable. Ms. Taormina has characterized her initial payment as a retainer, not a flat fee. She did not object to any charges as she received the bills, and paid more than the \$5,000 she now contends she agreed to pay. All of these facts were established by Ms. Taormina's statements in the Stevens County Court proceedings and in her admissions in her answer and/or her failure to deny the allegations of the complaint. (Allegations of the complaint that are not denied are deemed admitted. CR 8(d)).

In her appeal brief and in the underlying trial court proceedings, Ms. Taormina complained there was no written fee agreement, but this is immaterial. Her undisputed words, actions and the course of events establish there was an agreement. Enforceable agreements can be oral or implied. An implied contract is an agreement which arises from the acts or

conduct of a party and arises by inference or implication from circumstances showing a mutual intention of the parties to contract with each other. *Johnson v. Whitman*, 1 Wn. App. 540, 544-5, 463 P.2d 207 (1969). Ms. Taormina presented no evidence of contemporaneous words, actions or conduct disputing her agreement to pay her counsel. She refused to pay her bill only after the guardianship litigation was concluded and she no longer needed a lawyer.

Even if there was no enforceable agreement, Randall | Danskin is entitled to payment on the basis of quasi contract. In the absence of an enforceable contract the plaintiff is entitled to the reasonable value of the services performed if the services benefited the defendant with the defendant's knowledge and the defendant knew or should have known that the services were provided with the expectation of payment. WPI 301A.02. It is undisputed that legal services were provided to Ms. Taormina. Randall | Danskin sent out bills with the expectation of payment, and Ms. Taormina knew of that expectation. There is no evidence Ms. Taormina objected to any of the costs and fees until after the Spokane County Superior Court decided those fees were reasonable, but declined to reimburse them from her father's estate. By that time, the costs and fees had been incurred, the guardianship litigation was completed, and she no longer needed a lawyer.

Ms. Taormina also has admitted understanding that legal services were performed on her behalf and that her counsel expected to be paid, so she is estopped from disputing her debt. Promissory estoppel applies to prevent a party who stands by and, in violation of a duty in equity in good conscience to warn another, permits the latter to take action detrimental to his own interest. *Central Heat, Inc. v. Daily Olympian, Inc.*, 74 Wn.2d 126, 133, 443 P.2d 544 (1968). Ms. Taormina did not object to any of the costs and fees she incurred until after the Spokane County Superior Court refused to reimburse her from her father's estate. There is no evidence that she warned counsel she would pay only if the fees were reimbursed. To the contrary, Ms. Taormina refused to pay and disputed her bill only after the guardianship litigation was concluded and she no longer needed a lawyer. Accordingly, she is estopped from disputing her debt.

**E. Randall | Danskin is entitled to attorney's fees on appeal.**

Respondent Randall | Danskin seeks an award of its attorney's fees on appeal pursuant to RAP 18.7, 18.9, and CR 11.

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

RAP 18.7 requires a party filing a pleading in an appellate court to date it and sign it as required by CR 11. This provision incorporates the remedies for violation of CR 11 into the Appellate Rules. *Bryant v. Joseph Tree, Inc.*, 57 Wn. App. 107, 121, 791 P.2d 537 (1990) (aff'd at 119 Wn.2d 210, 829 P.2d 1099 (1992)). Court Rule 11 authorizes sanctions for the assertion of factually or legally frivolous claims. The purpose of CR 11 is to deter baseless filings and curb abuse of the judicial system. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992). Court Rule 11 was designed, in part, to reduce mounting legal costs. *Id.* If a pleading lacks a factual or legal basis, the Court must also conclude that the party who signed it and filed it failed to conduct a legal inquiry into the factual and legal basis of the claim. *Id.* That reasonableness inquiry is evaluated by an objective standard based upon what was reasonable to believe at the time the pleading was submitted. *Id.*

Randall | Danskin submits Ms. Taormina's appeal is frivolous within the meaning of RAP 18.7, 18.9, and CR 11.

At the summary judgment hearing in Stevens County Superior Court, Ms. Taormina agreed she had hired counsel and incurred attorney's fees, but tried to dispute the amount she owes. RP 3. The court carefully explained to Ms. Taormina that any dispute about the reasonableness or amount of her unpaid fees had been determined by the Spokane County

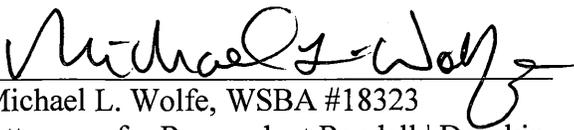
Court in the Guardianship action and that the Stevens County Superior Court could not and would not revisit that order. Ms. Taormina filed a motion for reconsideration repeating the arguments she made in her summary judgment motion. The reconsideration motion was denied and the Court again explained to her why it had granted summary judgment. RP 20-24. Thus, this appeal is the third occasion upon which Ms. Taormina has made the same arguments, despite the undisputed material facts and the applicable law.

## VI. CONCLUSION

The trial court order granting summary judgment to Randall | Danskin should be affirmed. Furthermore, Randall | Danskin should be awarded its fees in responding to this appeal.

DATED this 15 day of October, 2018.

RANDALL | DANSKIN

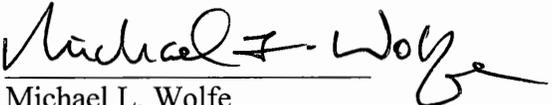
By:   
Michael L. Wolfe, WSBA #18323  
Attorneys for Respondent Randall | Danskin

**CERTIFICATE OF SERVICE**

I hereby certify that I caused to be served a true and correct copy of the **BRIEF OF RESPONDENT RANDALL | DANSKIN, P.S.** on the 15 day of October, 2018, addressed to the following:

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\_\_\_\_\_  
Michael L. Wolfe