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No. 63392-9-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

VANCE VOLLSTEDT, as Personal Representative of the ESTATE OF  
MARIE VOLLSTEDT; and VOLLSTEDT FAMILY LLC,

Appellants,

and

JELENA NIKIC, as Trustee of the MARIE VOLLSTEDT  
IRREVOCABLE TRUST; BRUCE MOEN, as trustee of the FRED  
VOLLSTEDT FAMILY TRUST,

Plaintiffs,

v.

DEYONNE TEGMAN, as Personal Representative of the ESTATE OF  
CHARLES TED VOLLSTEDT,

Respondent.

REPLY BRIEF OF APPELLANTS

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## I. INTRODUCTION

The sole issue before this Court is whether there are issues of material fact, and/or issues of law, which should have precluded the entry of summary judgment on statute of limitations and laches grounds by The Honorable Chris Washington. The Respondent's Brief (hereafter "Response") filed by CTV's Estate again demonstrates its preference for character attacks, prejudicial allegations, and speculation. This strategy is illustrated throughout the Response, and in every brief the Estate filed in Superior Court. Rather than respond at this level, this Reply will attempt to deal only with the merits.

Summary judgment should be reversed because there are material issues of fact regarding what Marie Vollstedt knew or should have known about her claims. There is no evidence Marie was on notice of her claims, no evidence she knew she had been harmed, and no evidence Ted made the full and complete disclosure required of a fiduciary, that he produced an accounting, or that he repudiated his fiduciary position. Similarly, there is no evidence which would have caused the statute of limitations to run on the LLC's claims while he was its sole manager.

It was error for the trial court to grant summary judgment. This Court should reverse, and the case should be remanded for trial on all issues.

## **II. REPLY TO RESPONDENT'S RESTATEMENT OF THE ISSUE**

Respondent's Restatement of the Issue does not refer to the statute of limitations, laches, or the discovery rule, although these are the sole grounds upon which the trial court granted summary judgment. Response at 3-4. In its Standard of Review discussion, the Response incorrectly characterizes the issue as "whether Vance presented sufficient evidence to support every essential element of his claims, or to establish some genuine dispute over material facts." Response at 27. Since the trial court did not grant summary judgment on the merits, this is not the issue before this Court. Accordingly, the Respondent's Issue Statement should be disregarded.<sup>1</sup>

## **III. REPLY TO RESPONDENT'S STATEMENT OF FACTS**

Respondent's Statement of Facts contains argument, and prejudicial commentary which requires a brief response. Since the principal issue before this Court is whether Marie knew or should have known of her claims, it is wholly irrelevant whether Vance or Jim were

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<sup>1</sup> The issue statement also misrepresents that certain facts are undisputed. Response at 3-4. Of the list provided, only the fact that Marie was competent is undisputed.

intelligent, could hold a job, were respected by Ted's peers, were beneficiaries under Marie's Will, were perceived as ungrateful or manipulative, or any of the other criticisms directed toward them by CTV's Estate. Response at 1, 5-8, 24. None of these allegations makes it more or less likely that Marie knew or should have known of her claims.

Also irrelevant is whether, in the opinion of others, Ted would have intentionally harmed his mother. Breach of fiduciary duty is not an intentional tort, and no claim was asserted for common law fraud. Although the Response argues that the LLC's claims are barred unless they involve intentional misconduct, this issue must be decided based upon the nature of Ted's acts *vis-à-vis* the LLC, not his mother. Therefore, the discussion at pages 15-18 of the Response is irrelevant.

The remaining facts asserted by CTV's Estate, to the extent they are relevant, will be dealt with in the Authority section below.

#### IV. AUTHORITY

**A. Summary judgment is not the appropriate procedure for resolving material issues of fact, determining the credibility of witnesses, or drawing inferences in the moving party's favor.**

It is fundamental that material issues of fact cannot be resolved at summary judgment, the credibility of witnesses cannot be decided, and all inferences must be drawn in favor of the nonmoving party.

*Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963).

Notwithstanding these restrictions, the Response asserts that numerous issues of fact should be resolved in its favor and credibility issues should by implication be ignored. These arguments merely serve to underscore existence of material issues of fact and the need for trial. The following is a sampling of the more significant issues in dispute, all of which are discussed with citations to the record in Appellants' Opening Brief:

- The existence of a confidential/fiduciary relationship between Ted and Marie. Appellants' Opening Brief at 4-6; Response at 41-44.
- The transfer of the 108<sup>th</sup> Street Property to Ted by gift deed without Marie's knowledge. Appellants' Opening Brief at 6-7; Response at 19.
- The purchase of Marie's shares in East Teak Lumber Co. without disclosure that other shares were purchased at the same time for a higher price. Appellants' Opening Brief at 8-9; Response at 21-22.
- The self dealing involved in Ted's loans from Marie to himself and to East Teak, and the undisclosed profits made therefrom. Appellants' Opening Brief at 7-8; Response at 20-21.
- Ted's failure to transfer title to Marie, or to pay her the profits upon sale, of his office at 5914 Lake Washington Blvd. after Marie paid off the bank and Ted's ex-wife and he represented she was the owner. Appellants' Opening Brief at 9-10; Response at 22-23.
- Ted's failure to disclose that he was transferring Brighton

East, a failed furniture division of East Teak, to Marie in repayment for a short term loan. Appellants' Opening Brief at 10-11; Response at 23.

- Ted's failure to make full and complete disclosure of his financial management of Marie's funds and assets at any point in time. Appellants' Opening Brief at 11-12; Response at 11-14.

In addition, the Response argues that the opinion testimony of Gordon Smith should be accepted without qualification even though Smith was Ted's long-time CPA, business and investment partner (including Ted's partner in the development of Marie's property on 108<sup>th</sup> St.), and Smith's lack of personal knowledge regarding many of the transactions is well documented and his credibility is at issue. Appellants' Opening Brief at 28-35.

Taken as a whole, the Response underscores the factual nature of the issues in dispute, and the inappropriateness of summary judgment. The decision should therefore be reversed.

**B. No evidence has been identified which demonstrates that Marie knew or should have known of her claims during Ted's lifetime.**

The Response fails to identify any substantive evidence that Marie knew or should have known of her claims while Ted was alive. As set forth in Appellants' Opening Brief,<sup>2</sup> the statutory period does

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<sup>2</sup> Appellant's Opening Brief at 21-24.

not begin to run simply because Marie knew Ted was handling her investments. There must be knowledge of harm, some triggering event, which put her to inquiry. *Gillespie v. Seattle-First National Bank*, 70 Wn. App. 150, 171, 855 P.2d 680 (1993). The Response cites no direct evidence of such a triggering event, nor does it cite evidence that Marie knew she had been harmed.

1. The fact that Marie was competent, “spoke her own mind,” and had Gordon Smith prepare her tax returns does not support an inference that she knew or should have known of her claims.

First, the Response asserts that Marie was competent, “spoke her own mind,” and had the benefit of Gordon Smith’s allegedly independent advice.<sup>3</sup> Yet, competency and candor do not support the inference that Marie should have discovered her claims. Were it otherwise, the statute would always run against all but the incompetent, meek or impaired. Several witnesses also testified that Marie trusted Ted, relied upon him out of naïveté, and was not astute enough to understand the complicated transactions Ted devised, which one witness described as a shell game. CP 2832 (27:14-25; 29:5-13); CP 2833 (30:16-17); CP 3089-90 (122:17-123:1); CP 3133 (22-59:1). This countervailing testimony, which the Response ignores, again

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<sup>3</sup> Respondent’s Brief at 3, 19, and 25-26.

demonstrates that there are issues of material fact regarding Marie's knowledge, reliance and ability to discover the true facts.

Gordon Smith's conflicts of interest and lack of testimonial knowledge are discussed above and in Appellant's Opening Brief.<sup>4</sup> In addition, it is undisputed that Smith never disclosed Ted's misdeeds to Marie, never disclosed that Marie had been damaged by Ted's management of her assets, and never discovered himself that many of the transactions, including the § 1031 exchange of the family home that he included in her tax return, did not occur.<sup>5</sup> Accordingly, there is no evidence that Smith ever said or did anything which should have put Marie on notice of her claims against Ted.

2. There is no direct evidence which demonstrates that Marie had actual knowledge of her claims against Ted.

Secondly, CTV's Estate argues that there is some direct evidence that Marie knew of her claims and refused to pursue them. In each instance, this evidence falls far short of proving actual knowledge as a matter of law.

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<sup>4</sup> Appellants' Opening Brief at 28-35.

<sup>5</sup> CP 3080 (63:19-64:1); CP 3082 (73:9-23); CP 3084 (87:1-2; 87:17-88:4); CP 3094 (149:10-14); CP 3098 (165:24-166:12); CP 3099 (181:3-9); CP 3100 (185:3-6); CP 3103 (218:10-18); CP 3105 (224:13-18); CP 3107 (231:9-20; 232:5-23); CP 3110 (252:9-253:3; 253:16-25); CP 3112 (273:1-24); CP 3119 (329:3-5); CP 3121-22 (399:24-401:4); CP 3124-25 (410:1-7; 411:20-412:2).

- a. *The interrogatory answers do not admit that Marie knew of her claims.*

CTV's Estate relies upon interrogatory answers provided by Vance to claim that Marie had full knowledge of her claims against Ted. The answers are in response to Interrogatories 1-6, which seek information regarding the allegations in Paragraphs 8-13 of the Complaint. *See* CP 1821-25; CP 6-8. Contrary to the representations in the Response, the answers state that Marie became aware "of *some* of [the] events" alleged in the Complaint at or about the time they occurred, not all. CP 1821-25 (italics added). The answers refer to the fact that Marie knew she was investing funds with Ted, as evidenced by her signature on checks and other documents; however, they never state that Marie knew she was being harmed by Ted, or that he had breached his fiduciary obligations to her. *Green v. A.P.C.*, 136 Wn.2d 87, 95, 960 P.2d 912 (1998) (a cause of action governed by the discovery rule does not accrue until a party knows or should have known all "the essential elements of the cause of action—duty, breach, causation, and damages").

- b. *The deposition testimony of McFadden, Hill and Nikic do not establish that Marie knew of her claims.*

At pages 29-30, the Response states: "Mr. McFadden, Mr. Hill and Ms. Nikic confirmed that for far more than three years before

Vance filed this suit, Marie (and Vance) questioned whether Ted was fully repaying loans, making good on investments, or giving fair value for real property.” This statement, which goes to the heart of the issues in dispute, is untrue.

Gordon McFadden testified that Marie told him, “I helped Ted, he wouldn’t own that business if it weren’t for me . . .” CP 2777 (59:19-20.) There was no discussion of repaying loans, making good on investments, or giving fair value. Drawing all inferences in the nonmoving party’s favor, this testimony demonstrates that Marie helped Ted, and perhaps considered him ungrateful, but it does not establish that Marie knew or should have known that Ted breached his fiduciary duties to her.

The testimony of Jelena Nikic, Ted’s successor as trustee of the MVIT, deals with conversations between Vance and Marie after Ted’s death, and within two years of filing suit.<sup>6</sup> CP 2793 (134:18-137:14). There is nothing in the content of these conversations which deals with

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<sup>6</sup> The line of questioning cited in the Response starts with this preamble by defense counsel:

Q. Backing up a little bit, between the time that Ted died and you ended up filing a creditor’s claim against Ted’ Estate, were you aware of Vance talking to Marie about what Vance believed Ted had been doing over the years?

CP 2793 (134:18-22).

“fully repaying loans, making good on investments, or giving fair value for real property” or which indicates that Marie was placed on notice of her claims more than three years before suit was filed.

The third witness relied upon is Ed Hill, a business associate of Ted. Again, there is nothing in Mr. Hill’s testimony which deals with “fully repaying loans, making good on investments, or giving fair value for real property.” Mr. Hill’s testimony only establishes that Marie trusted Ted “110%” and relied upon him as her fiduciary. CP 2833 (30:16-17); CP 2835-36 (60:23-61:4; 61:21-62:1; 62:24-63:5; 64:17-65:1).

Finally, the Response cites, but does not discuss, testimony by Vance to the effect that his mother said she regretted selling her shares in East Teak Lumber Co., (“ETLC”) and that this lament was repeated “again and again and again over the years.” CP 2993 (442:20-443:5). Yet, there is no claim in this lawsuit which alleges it was a breach simply to buy back these shares. The claim is that the shares were purchased for less than the amount paid to another insider at the same time, and for less than Ted valued some of his own shares. CP 1887 ¶¶22-24; CP 1962, 2492-95. These were private sales within Ted’s control which Marie could not have known of unless disclosed by Ted. CP 2670-76. Nor is there any evidence that Marie ever knew, or had

reason to know, she was paid less than others. CP 1887 ¶23; CP 2001 ¶10. Drawing all inferences in her favor, Marie's statement shows nothing more than regret at having sold shares in a successful company. It does not prove that she knew or should have known of her claims more than three years before they were filed.

c. *Vance's knowledge, or that of his brother Jim, is irrelevant for statute of limitations purposes.*

The claims at issue arose between Ted and Marie, or between Ted and the family LLC he managed. Neither Vance nor his brother Jim own these claims in their own right.<sup>7</sup> Accordingly, what Vance or Jim may have thought, known, suspected or desired at any point in time prior to Ted's death is irrelevant.<sup>8</sup> *Ives v. Ramsden*, 142 Wn. App. 369, 385, 174 P.3d 1231 (2008) (son's suspicions of stockbroker negligence did not trigger statute of limitations on claims owned by father).

CTV's Estate offers Ted's letter to his brothers of May 23, 1996, as conclusive evidence of inquiry notice. Response at 15; CP 180. However, under *Ives*, it is irrelevant whether Vance and Jim were put to inquiry. 142 Wn. App. at 385. The letter is cc'd to Marie, but

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<sup>7</sup> The Response postures this case as a dispute between Vance and Ted's teenage children, going so far as to designate the dismissed claims, "Vance's Claims." Response at 2-3.

<sup>8</sup> The Response's discussion of Vance's knowledge is at pages 29 & 30, which cite his testimony at CP 82-83 & 90.

there is no evidence she received it. Even if she did, the letter does not say anything which would put Marie to inquiry, or which repudiated Ted's role as her fiduciary. To the contrary, Ted admits in the letter that he is hoping his brothers will "gain a sense of trust and confidence about what I have been trying to do on behalf of Marie." CP 180. Interpreting the evidence in the manner most beneficial to Marie, nothing in this letter put her on notice that Ted was breaching his fiduciary duties to her, or causing her harm.

**C. The existence of a fiduciary relationship between Ted and Marie and between Ted and the LLC he managed are relevant for statute of limitations purposes.**

1. Marie was in a confidential or fiduciary relationship with Ted at all times relevant to her claims. Any claim to the contrary raises an issue of material fact.

As Appellant's Opening Brief anticipated,<sup>9</sup> CTV's Estate refuses to admit that a confidential and/or fiduciary relationship existed between Ted and Marie for purposes of arguing whether summary judgment on statute of limitations grounds was appropriate. The facts and law establishing these relationships will not be restated here. Appellants' position is that the existence of these relationships may be decided as a matter of law. However, if the Court determines there are material issues of fact pertaining to Marie's relationship with Ted, then

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<sup>9</sup> Appellants' Opening Brief at 20.

it was error to grant summary judgment under the statute of limitations and laches. Ted's fiduciary duty to the LLC now appears to be admitted by CTV's Estate. Response at 41 fn. 8.

2. The statute of limitations was tolled while Ted was in a continuous relationship with Marie and the LLC.

Relying upon a series of common law fraud cases, the Response argues there are no exceptions to the discovery rule as it relates to fiduciaries. Response at 31-33. As a threshold matter, these decisions are not on point since common law fraud is not one of the causes of action at issue. Washington case law also recognizes that the statute may be tolled by equitable doctrines such as the continuous relationship and/or continuing representation rules, and fraudulent concealment.

Under the common law, any claims against an express or resulting trust did not accrue until the trust was terminated or repudiated. *See Janicki Logging v. Schwabe, Williamson*, 109 Wn. App. 655, 661-662, 37 P.3d 309 (2001); *Gillespie v. Seattle-First Nat'l Bank*, 70 Wn. App at 158-159; *Arneman v. Arneman*, 43 Wn.2d 787, 797, 264 P.2d 256 (1953). This rule, known as the continuous relationship rule, has been applied to ongoing fiduciary relationships other than express or resulting trusts, and a corollary rule, the continuous representation rule, has been applied to attorneys and

accountants. See *Hermann v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 17 Wn. App. 626, 630, 564 P.2d 817 (1977) (continuous relationship rule applied to account executive); *Golden Pacific Bancorp v. FDIC*, 273 F.3d 509, 518-19 (2<sup>nd</sup> Cir. 2001) (applying New York law) (a beneficiary is entitled to rely upon a fiduciary's skill until the relationship is terminated); *Frank v. Tavares*, 142 Cal. App. 2d 683, 298 P.2d 887, 890 (1956) (continuous relationship rule applied to fiduciary or confidential relationships generally); *Janicki Logging*, 109 Wn. App. at 661-662 (continuous representation applied to attorneys); *Burns v. McClinton*, 135 Wn. App. 285, 297-98, 143 P.3d 630 (2008), *rev. denied* 161 Wn.2d 1005 (2007) (continuous representation rule applied to an accountant).

Ted served as his mother's fiduciary and as manager of the LLC on a continuous basis. His responsibilities did not involve professional services and he was not engaged to perform specific tasks. At no time did he cease to act as a fiduciary or repudiate his position. Under these circumstances, the continuous relationship rule tolls the statute of limitations until each relationship terminated.

Even if the continuous representation rule is applied, the outcome would be the same. In Ted's case, the relationship and the representation were coextensive. Ted managed Marie's financial

affairs, and directed her investments for decades. CP 2149-76, 2285-88, 2293-97, 2303-05, 2366-74, 2450-60, 2462, 2464, 2466-74. He was the sole manager of the LLC, handling all its business matters. CP 2083, 2092. There is no evidence that he terminated either relationship, or was “engaged” to perform specific tasks. Under these circumstances, there is no principled distinction between the relationship and the representation. *See, Morrison v. Watkins*, 20 Kan. App. 2d 411, 889 P.2d 140, 146-47 (1995) (continuous representation rule did not cause statute to run until relationship was terminated when attorney’s engagement was analogous to a trustee and representation was ongoing).

3. The Adverse Domination Doctrine provides additional legal authority for the proposition that the statute of limitations on the LLC’s claims was tolled while Ted served as its manager, a theory the LLC argued to the trial court.

CTV’s Estate argues that the Adverse Domination Doctrine should not be considered because the Doctrine was cited for the first time on appeal. In support it relies upon RAP 9.12. However, the issue of whether the statute of limitations on the LLC’s claims should be tolled while Ted served as its manager and controlled the decision to file suit was raised both in briefing and at oral argument below. CP 1965-66; RP 43-44. The Adverse Domination Doctrine merely

provides additional legal authority for this position.

The Supreme Court has recognized that RAP 9.12 does not preclude citation to additional authority.

There is no requirement to list every statute, code, or case brought to the attention of the trial court [at summary judgment]. Nor should there be, as any court is entitled to consult the law in its review of an issue, whether or not a party has cited that law.

*Ellis v. City of Seattle*, 142 Wn.2d 450, 459-60, 13 P.3d 1065 (2000); *see also State Farm Mutual Automobile Ins. Co. V. Amirpanahi*, 50 Wn. App. 869, 872, 751 P.2d 329 (1988) (where basic reasoning of argument was presented below, additional legal authority may be presented). Accordingly, the argument is proper.

This case presents a straightforward application of the doctrine. Ted controlled the LLC and its decision to file suit from formation until his death. CP 2083, 2088-2106; CP 2732 ¶5. There is no evidence Ted ever produced an accounting, or disclosed the loans in question. The “books of the LLC”, which the Response cites and claims were available for review, are actually work papers produced by Gordon Smith and not the LLC, as evidenced by the bates numbers. CP 2595-96, 2599-2600; Response at 34. No-one other than Ted was authorized to act on behalf of the LLC, and there is no evidence that Marie had knowledge that he loaned funds of the LLC to East Teak or his former

business partner. CP 1888-89 ¶30, CP 2000 ¶4, CP 2732 ¶5. Accordingly, it was error for the trial court to rule that the claims of the LLC became time barred while Ted served as its manager.

4. Ted's failure to make full and complete disclosure as a fiduciary constitutes fraudulent concealment tolling the statute of limitations.

The discussion of fraudulent concealment by a fiduciary in the Response takes a blunderbuss approach, yet largely misses the point. If the defense is that Ted was not a fiduciary, then there are issues of material fact which preclude summary judgment. If the defense is that failure to disclose by a fiduciary is not fraudulent concealment, then no authority to support that position has been cited. If the defense is that Ted made full and complete disclosure of his self dealing and wrongful profits to his mother and the LLC, then no evidence of such disclosure has been cited. If the defense is that Marie knew, or should have known of her claims, then summary judgment was improper for the reasons set forth. As was the case with the beneficiaries in *Gillespie*, Marie was entitled to rely upon Ted as her fiduciary until she was placed on notice of some appreciable harm caused by him. *Gillespie*, 70 Wn. App. at 170. There is no evidence of such a triggering event in the record before this Court. His failure to make full and complete disclosure further acted to fraudulently conceal the claims against

him.<sup>10</sup> Accordingly, the summary judgment should be reversed.

**D. It was error for the trial court to dismiss Marie’s claims and those of the LLC for laches.**

A plaintiff “cannot be deemed guilty of laches while the fraud remains undiscovered, unless by the exercise of ordinary diligence he might sooner have discovered it.” *Carstens v. Morck*, 159 Wash. 129, 136, 292 P. 262 (1930) (quoting 27 C.J. 764). Thus, the discovery rule—and all the arguments set forth above—apply to laches as well as to the statute of limitations.

CTV’s Estate argues that it has been prejudiced because both Ted and Marie are dead. However, any prejudice must result from a party sleeping on their rights, not from the mere passage of time. *Buell v. City of Bremerton*, 80 Wn.2d 518, 522, 495 P.2d 1358 (1972) (all the elements of laches must be proven. No one element is sufficient). Marie did not discover her claims until after Ted’s death in April 2005. CP 2802-03. Suit was filed within two years, as required by the Creditor’s Claim Statute, RCW 11.40.051(1)(b)(ii). There is no evidence that Marie or her Estate or the LLC sat on their rights.

The claims of prejudice asserted by CTV’s Estate are also without merit. Washington law requires full and complete disclosure

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<sup>10</sup> See Appellants’ Opening Brief at 44-46 and citations to authority therein.

by a fiduciary. Any omissions in the financial record are at the risk of the fiduciary. The duty to keep accurate books of account and to preserve important records has been described as “unqualified,” “clear and beyond question.” *Wool Growers Service Corp. v. Simcoe Sheep Co.*, 18 Wn.2d 655, 698, 140 P.2d 512 (1943).

Failure to perform this duty, and to comply with this obvious requirement, properly entails consequences which follow almost automatically and as a necessary result therefrom. The almost necessary presumption is that the purpose of a failure in this respect has been to cover up or conceal what the records accurately kept would have disclosed.

*Id.*; See also *Wilkens v. Lasater*, 46 Wn. App. 766, 777-78, 733 P.2d 221 (1987) (any uncertainty in the accounting is at the risk of the trustee).

Ted had an obligation to account as a fiduciary. *Causten v. Barnette*, 49 Wash. 659, 667-68, 96 P. 225 (1908); RCW 25.15.155(2). When he died, that obligation passed to his estate. *Tucker v. Brown*, 20 Wn.2d 740, 771, 150 P.2d 604 (1944). The difficulties created by the lack of any record of disclosure by Ted are the result of Ted’s actions during his lifetime, not anything Marie or the LLC did or failed to do.

Any equitable claim or defense, including laches, requires that the party asserting it have clean hands. The trial court’s right to consider the inherent equities of a case—which would include unclean

hands—was argued to the trial court and may be raised on appeal. CP 3073. The grant of summary judgment on laches grounds should therefore be reversed.

**E. The claim that Ted was in a confidential or fiduciary relationship with Marie and the LLC are well founded in fact and law.**

In Section D of the Response, CTV's Estate again disputes the existence of a fiduciary relation between Ted and Marie. As discussed previously, these arguments are incorrect as a matter of law. To the extent there is any question of fact, summary judgment is inappropriate.

One argument which requires correction is the assertion that the existence of a confidential relationship is immaterial because the only claims in dispute are loans and not gifts. This is incorrect. Ted acquired title to the family home on 108<sup>th</sup> Street in Bellevue by filing three gift deeds listing the consideration as "love and affection." CP 2268-70. Marie's Estate seeks the return of this property or its value under the rule set forth in *McCutcheon v. Brownfield*, 2 Wn. App. 348, 356, 467 P.2d 868 (1970). Ted also claimed that Marie forgave loans to him, resulting in a gift. CP 1886 ¶21; CP 1901, 2299-2301, 2573. These claims are asserted in the Complaint, in briefing to the trial court and are addressed in Mr. Roberts' reports. CP 8, CP 724, CP 1990. Furthermore, there is no evidence that Marie ever knew or should have

known that Ted effected these transfers by gift.

**F. Gordon Smith's testimony raises numerous credibility issues and cannot support summary judgment as a matter of law.**

Appellant's Opening Brief sets forth the problems with Gordon Smith's testimony based upon his lack of testimonial knowledge, opinion testimony not based upon his personal perception, his conflicts of interest as Ted's long time CPA and business partner (including his personal interest in 108<sup>th</sup> St. transaction), and the conflicts within his own testimony.<sup>11</sup> These issues raise material issues of fact which cannot be resolved at summary judgment.

CTV's Estate argues that absent a motion to strike, Smith's testimony must be accepted as a verity. The decision relied upon, *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 692, 106 P.3d 258 (2005), does not support this assertion. *Burbo* dealt with whether a motion to strike could be made at the appellate level. Nothing in that decision requires that the evidence in the record be accepted at face value when there is de novo review. The initial inquiry on summary judgment is always whether there are genuine issue of material fact which require a trial. CR 56(c); *Jones v. Dept. of Health*, 140 Wn. App. 476, 487, 494, 166 P.3d 1219 (2007). This necessarily requires a

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<sup>11</sup> Appellants' Opening Brief at 28-35.

critical examination of the evidence. Gordon Smith's testimony raises numerous credibility issues which cannot be resolved at summary judgment, all of which were argued before the trial court. CP 1966-70, 3056-64. Accordingly, his testimony is not "dispositive of a statute of limitations accrual analysis," as claimed by CTV's Estate. Response at 45.

**G. There is no basis for disregarding Steve Roberts' testimony at summary judgment.**

The Response asks this Court to disregard the testimony of the Appellants' forensic accounting expert, Steve Roberts, on the grounds that he is not qualified, that it is not credible, that it is based upon speculation, and that there are math errors. Response at 2, 21-22. None of these criticisms, which are made largely without authority of citation to the record, have merit.

Steve Roberts is a CPA and certified fraud examiner. CP 1881. He is the only expert to have reviewed the thousands of financial documents produced and to have rendered a report. CP 1881-91; CP 1895-1953. He is certainly capable of opining on whether a lay person, such as Marie, could have deciphered the morass of documents he reviewed. He is also capable of determining if any of the documents he reviewed evidence disclosure or consent. As with a lay witness, any

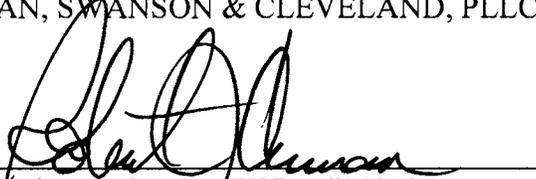
issue of credibility would only raise an issue of material fact which would preclude summary judgment. Accordingly, the attacks on Mr. Roberts are without basis, and cannot justify summary judgment of dismissal.

## V. CONCLUSION

For the reasons stated above, this Court should reverse the Order Granting Defendant's Motion for Partial Summary Judgment, and remand this matter to the trial court for trial on the merits.

DATED this 23rd day of October, 2009.

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## DECLARATION OF SERVICE

I declare that on the 23<sup>rd</sup> day of October, 2009, I caused the foregoing document to be served on counsel for all interested parties, as noted, at the following addresses:

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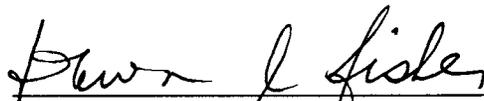
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