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NO. ~~64231~~ 64231-6

COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION I

DAVID L. MARTIN
APPELLANT

VS.

LORETTA D. WILBERT, AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF WILLIAM E. WILBERT AND INDIVIDUALLY
RESPONDENTS

BRIEF OF APPELLANT
&
CERTIFICATE OF SERVICE

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TABLE OF CONTENTS

| | |
|---|-----|
| TABLE OF AUTHORITIES..... | ii |
| Table of Cases..... | ii |
| Table of Court Rules..... | iii |
| Table of Statutes..... | iii |
| Table of Other Authorities..... | iv |
| Assignments of Error and Issues Related..... | 1 |
| Assignment No. 1: The Trial Court Made an Error in Granting Wilbert’s Summary Judgment Motion..... | 1 |
| Assignment No. 2: Denial of Two Martin Discovery Motions Was an Abuse of Discretion..... | 2 |
| Statement of the Case..... | 2 |
| Summary of Argument..... | 7 |
| Argument..... | 8 |
| Valuable Estate Assets Were Not Administered..... | 8 |
| Martins’ Denied Discovery Motions..... | 11 |
| The Illusion of Preclusion..... | 14 |
| History of the Delguzzi Appeals..... | 15 |
| Preclusive Events..... | 22 |
| Footnote 19 Alleges a Legal Precedent Based on Issues and Evidence Specifically Excluded by the Opinion..... | 24 |
| Statute of Limitations and RCW 11.96A.070(2)..... | 26 |
| Statute of Limitations – Estoppel..... | 30 |
| Wilbert’s CR 12 Summary Judgment Defenses..... | 31 |
| Disputed Material Facts Exist..... | 33 |
| Latches..... | 34 |
| Conclusion..... | 35 |

APPENDIX

| | | | |
|---|--------------------|---|---|
| A | January 8, 1999 | 21752-0-II | Delguzzi I |
| B | August 31, 2001 | 24860-3-II | Delguzzi III |
| C | June 29, 2009 | 36682-7-II | Delguzzi IV |
| D | August 21, 2009 | 08-2-10290-4 SEA- Martin v. Wilbert (this case) | Summary Judgment Demonstrative Exhibit |

Table of Authorities

Table of Cases

August v. U. S. Bancorp, 146 Wn. App. 328, 190 P.3d 86 (2008). 31

Barnum v. State, 72 Wn. 2d 928, 435 P.2d 678 (1967)... 32

Bostock v. Brown, 198 Wash. 288, 88 P.2d 445 (1939). 21

Bly v. Pilchuck Tribe No. 42, 5 Wn. App. 606, 489 P.2d 937 (1971). 32

Case v. Knight, 129 Wash. 570, 225 P. 645 (1924). 21, 23

Crisman v. Crisman, 85 Wn. App. 15, 931 P.2d 163 (1997)... 29

Cummings v. Guardianship Services of Seattle, Inc.,
128 Wn. App. 742, 110 P.3d 796 (2005)... 20

In re Firestorm, 129 Wn.2d 130, 916 P.2d 411 (1996). 14

Gorman v. Garlock, 155 Wn.2 198, 118 P.3d 311 (2003). 33

Halvorson v. Dahl, 89 Wn.2d 673, 574 P.2d 1190 (1978). 33

In the Matter of the Estate of Black, 153 Wn.2d 152, 102 P.3d 796 (2004). 25

In re Dyer’s Estate, 161 Wash. 498, 297 P. 196 (1931)... 10, 11

In the Matter of the Estate of George F. Price, 53 Wn. 2d 393,
333 P.2d 929 (1959). 10, 11

In re Marriage of Sanborn, 55 Wn. App. 124, 777 P.2d 4 (1989)... 35

Knapp v. Order of Pendo, 36 Wash. 601, 79 P. 209 (1904). 34

Leija v. Materne Bros., 34 Wn. App. 825, 827, 664 P.2d 527 (1983)... 20

Marriage of Dicus, 10 Wn. App. 347, 40 P.3d 1185 (2002)... 34

McCurry v. Chevy Chase Bank, FSB, __ Wn.2d __, __ P.3d __,

| | |
|---|------------|
| No. 81896-7, June 24, 2010. | 33 |
| Paradise, Inc., v. Pierce County, 124 Wn App. 758, 102, P.3d 173 (2004). | 34 |
| Pearson v. Vandermay, 67 Wn.2d 222, 407 P.2d 143 (1965). | 33 |
| Pederson v. Potter, 103 Wn. App. 62, 11 P.3d 833 (2000). | 22 |
| State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992). | 33 |
| Woeppel v. Simanton, 53 Wash. 2d 21, 330 P.2d 321 (1958). | 23 |
| Table of Court Rules | |
| CR 12. | 31, 32, 34 |
| CR 12(b)(6). | 31, 33, 34 |
| CR 12(c). | 33 |
| RAP 7.2(l). | 17, 20 |
| RAP 10.4(h). | 33 |
| Table of Statutes | |
| R.C.W. 4.16.170. | 1, 28, 35 |
| R.C.W. 4.16.200. | 27 |
| R.C.W. 11.40.070. | 27 |
| R.C.W. 11.40.100. | 27, 28 |
| R.C.W. 11.40.051. | 27 |
| R.C.W. 11.96A.070. | 26, 27, 28 |
| R.C.W. 11.96A.250. | 28 |
| Other Authorities | |
| Trautman, Philip A., Claim and Issue Preclusion in Civil Litigation in Washington, 60 Wash. L. Rev. 805, p. 822 (1985). | 20, 21 |
| Wash. Practice, Civil Procedure, Vol. 15A | |
| §4.10. | 26, 27, 28 |
| §35.23. | 23 |

ASSIGNMENT OF ERROR AND ISSUES

ASSIGNMENT NO. 1: THE TRIAL COURT MADE AN ERROR OF LAW IN GRANTING WILBERT'S SUMMARY JUDGMENT MOTION.

Issues Related to Assignment No. 1:

- Where a probate administration fails to inventory or administer certain of the estate's assets, does an estate's closing order preclude the later administration of those assets or estop the heir from bringing claims in pursuit of the assets or their values?
- Where a probate court assigns claims against an administrator to the heir and orders the successor administrator not to pursue the assigned claims and the court is barred from hearing the separate pending action on those claims within the probate proceeding, does the estate closing order preclude the heir's assignee from pursuit of the claims in another forum after the estate's closure?
- Where the appellate court has previously rejected res judicata as a defense, must the party establish changed circumstances in order to later assert that a claim is barred by res judicata?
- When a defendant dies before the statute of limitations has run as to claims against him and the plaintiff complies with the probate non-claims statute after the defendant's death, may the trial court dismiss the Complaint based upon the statute of limitations?
- Where the Complaint alleges fiduciary fraudulent concealment, may the trial court enter a summary judgment of dismissal based upon the statute of limitations before the fact finder determines the disputed factual issue of fiduciary fraudulent concealment?
- Must a CR 12 motion be denied upon a showing that "... it is possible that facts could be established to support the allegations in the complaint?"
- Does a factual finding in an unpublished opinion of the Court of Appeals that describes the causes of action in a complaint become law of the case in the trial court for purposes of CR 12?
- Does RCW 4.16.170 bar dismissal of the Complaint on a statute of limitations allegation where a defendant has been continuously subject to the court's jurisdiction for the prior 13 years defending against breach of fiduciary duty claims brought by the estate's heir?
- May laches properly be the basis for dismissal of a Complaint for damages where the fiduciary defendant's hands were dirtied by

intentional discovery abuse and no damages attributable to delay were shown, and the applicable fiduciary duty statute of limitation was still open?

- May a trial court rely upon a legal precedent in an unpublished opinion where 1) the subject of the legal precedent 2) was specifically excluded from the issues on review and 3) where the record on review did not include the pleadings which were the basis for the precedent?

ASSIGNMENT NO. 2: DENIAL OF TWO MARTIN DISCOVERY MOTIONS WAS AN ABUSE OF DISCRETION

Issues Related to Assignment No. 2:

- Did the trial court abuse its discretion in granting a motion to terminate the deposition of Michael Zeno where he was the only witness known to have knowledge of material facts relevant to the case before the trial court?
- When the defendant-estate-administrator's daughter was his office manager testifies that she transferred file boxes of estate records to the attorney for the defendant, was it an abuse of discretion to deny the plaintiff's motion to compel production of those records from her attorney, who also represented the defendant?

STATEMENT OF THE CASE

The early history of this long term claim for damages against the estate's administrator has been established in three unpublished opinions of Division II.²

On January 17, 1997, the last court day before hearing on the Petition for Removal of William Wilbert, the administrator of Gary

2

The four Delguzzi appeals are referred to in a prior opinion of this court as "Delguzzi I" through "Delguzzi IV". Appellant's Appendix includes the three relevant Delguzzi opinions. Delguzzi II, February 26, 2001, concerned Gary Delguzzi's trust, and not relevant to this appeal. The three relevant opinions are all included in the record on review.

Delguzzi's father's estate, Gary's Petition for Damages against Mr. Wilbert (1996 Complaint) was dismissed based upon Wilbert's representations to the trial court that Gary had only objected to Wilbert's discovery requests, when Gary had actually provided a substantive response to each of the requests. [Delguzzi III at note 5.] Wilbert had provided Gary's four pages of objections to the court, representing that they were Gary's answers, which were 38 pages.

While the dismissal of Gary's 1996 Complaint was under review at Division II, Mr. Wilbert proceeded with the hearing on his Petition for Final Accounting and Decree of Distribution in 1997, which resulted in a Memorandum Decision on October 10, 1997 [CP 832] and an Order Regarding Administrative Expense Reimbursement on June 6, 1998, the "1998 closing order".[CP 838]

After Delguzzi I on January 8, 1999, Gary again noted for hearing his November 1996 motion to compel discovery and Wilbert moved to block that motion which had originally been noted, but not heard, for January 17, 1997, because of the dismissal of Gary's Complaint. [Delguzzi III at *6-7] The trial court granted Wilbert's dismissal motion based upon res judicata, collateral estoppel and law of the case. [Delguzzi III at *14-19.] Gary appealed again, and his case spent another two years in appellate limbo until reinstated by Delguzzi III. Wilbert remained in office, despite the closing order of June 5, 1998 which directed him to promptly close the probate.

Gary and Mr. Wilbert both died in the first quarter of 2004, leaving the Jack Delguzzi estate still open in its 26th year. [Delguzzi IV at fn.1]. Delguzzi IV at fn. 5, noted that Wilbert's death made Gary's Petition for Removal moot. [CP 870-874] (Delguzzi 1 at *2)

Gary Delguzzi's estate continued to assert his claims against Mr. Wilbert's estate and in 2006, after the probate court assigned the claims of the Jack Delguzzi estate to Gary's estate [CP 1860-2] and when the creditor's claim of Gary's estate was denied in November of 2006, suit was filed. [CP 1867] Thirteen months later, venue of the case was changed from Clallam to King County on Wilbert's motion. [Delguzzi IV at 23-24]

In 2005, Ms. Kathryn Ellis was nominated by Wilbert attorneys Cori Flanders-Palmer and Michael Zeno as the Jack Delguzzi estate administrator. Her order of appointment included the following:

There is presently pending an action by the Estate of Gary Delguzzi verses the Estate of William E. Wilbert, et al. On or about August 10, 2004, the Estate of Jack Delguzzi, through David Martin acting as interim Administrator, filed a creditor's claim against the Estate of William E. Wilbert in King County Superior Court. To date the claim has neither been approved nor rejected. Unless otherwise ordered by the Court, the Administrator of the Estate of Jack Delguzzi shall not process or pursue the claim against the Estate of William E. Wilbert pending final resolution of the case of Estate of Gary Delguzzi vs. Estate of William E. Wilbert, et al.[CP 2106, ¶ 5]

Ms. Ellis closed Jack Delguzzi's estate on July 27, 2007. ("2007 closing order")[CP 1820-22].

Gary's estate had acquired the claims of his father's estate against

Wilbert by order of the probate court in 2005 [CP 890-1] and in 2007, those claims and Gary's claims as a partner, creditor, co-tenant and shareholder in corporations with the estate [CP 828, Exh. 7] were assigned to David L. Martin [CP 1860-1864], the C.P.A. who had served as temporary administrator of the Jack Delguzzi estate after Mr. Wilbert's death in 2004. Mr. Martin is the appellant.

Mr. Martin continued to seek discovery from Mr. Wilbert's estate during pretrial proceedings in King County, but his attempts to secure documents and testimony about estate assets were met with frustration. [CP 797; 1003-1006] The trial court denied his attempts to gather estate documents from Mr. Wilbert's daughter, Laure, who was his office manager Jack Delguzzi's estate administrator. Ms. Wilbert testified that she delivered estate records to the office of Michael Zeno, her attorney who also represented her mother, Ms. Loretta Wilbert, the personal representative for Mr. Wilbert's estate. [CP 655, estate files; CP 676, delivery to Zeno.]

Mr. Zeno refused to produce these files in regular discovery proceedings and successfully resisted a subpoena to his law firm, as a non-party, for the files. Laure Wilbert testified that she delivered the estate files to Zeno's office for the use of Ms. Ellis, as the successor Jack Delguzzi estate administrator. A subpoena duces tecum was utilized to attempt recovery of the files from Mr. Zeno's law firm, as Ms. Laure Wilbert was not a party and claimed to have delivered estate files to

Mr. Zeno, who refused to identify or produce them in response to CR 34 discovery requests. The court quashed the subpoena. [CP 1003]

Attempts to secure Mr. Zeno's testimony about the estate's farm in Costa Rica ("Finca Delguzzi"), which was first ordered to be inventoried by the probate court during Wilbert administration in September 1999, [CP 1438] were stubbornly resisted and not successful, as the court ordered that his deposition be terminated before it was completed. [CP 1005] In 2005, Mr. Zeno advised Ms. Ellis in an email which he produced in a related Delguzzi case about the Costa Rica farm or finca. [CP 646; 1442]. When he was directed to appear and testify to complete that testimony in this case, he did so initially and then left the deposition before it was completed, when questions about his knowledge of the Costa Rica farm became imminent.[CP 747]

After Martin sought an order requiring him to return and finish the deposition [CP 681] Zeno moved for an order terminating his testimony [CP 803], which the trial court granted. [CP 1005]

There was no inventory or order of distribution of the Costa Rica farm during either Mr. Wilbert's or Ms. Ellis' administrations and its current status is still unknown to Mr. Martin.

On August 31, 2009, hearing was had on Wilbert's summary judgment motion. [VRP August 21, 2009] which was based on five defenses, primarily on footnote 19 of Delguzzi IV, which alleged a preclusive effect as to Gary's 1996 Complaint (Petition for Damages)

against Mr. William Wilbert, as administrator of the estate of Jack Delguzzi. In response to the motion, Martin introduced evidence of assets of the Jack Delguzzi estate that were not inventoried and for which there was no evidence of their administration or distribution. [CP 1037-1652]

SUMMARY OF ARGUMENT

The Delguzzi IV opinion entered shortly before Wilbert's summary judgment motion was filed in July of 2009 provided the defendant with an opportunity to create confusion with a baseless defense claim of "preclusion" and to so avoid the Complaint of Gary Delguzzi coming to trial once again. The very substantial value of estate assets that were not listed in either of the Jack Delguzzi estate's two closing orders (1998 and 2007) and not administered for the benefit of the estate's heir, creditors and co-tenant are the most obvious matters that cannot be subject to preclusion under any doctrine and which alone require reversal of the summary judgment order that dismissed the Complaint. Mr. Zeno's stuttering admissions and halting argument to challenge Martin's evidence, without rebuttal evidence demonstrates the confusion strategy that Wilbert relied upon throughout this litigation as well as the lack of defense evidence. [VRP, August 21, 2009]

The 2007 closing order could not address or constitute a final and preclusive order as to the 2006 Complaint because those claims were previously assigned to Gary's estate, leaving the probate court without

jurisdiction over them at the time of entry of the 2007 closing order.

The probate court has a continuing jurisdiction and duty to determine the ownership and entitlement to the assets in which Jack and Gary Delguzzi had interests that were not previously administered and the cases that have looked at this issue have uniformly so held.

Since Wilbert's resistance to the issue was based solely on argument, as a matter of law, there could not be a properly granted summary judgment on the omitted assets issue.

Denial of Martin's motions to complete the deposition of Zeno and to compel production of the estate records transferred to him by Ms. Laure Wilbert were abuses of discretion and must be reversed.

ARGUMENT

VALUABLE ESTATE ASSETS WERE NOT ADMINISTERED

Assets identified in Martin's response to Wilbert's motion for summary judgment were not inventoried by Mr. Wilbert and not administered or distributed by either Mr. Wilbert's 1998 closing plan or the 2007 closing order of successor administrator Ellis. These orphan assets were brought to the attention of the trial court, which did not recognize that the probate court still retained jurisdiction over these assets and had a duty to see that they were properly administered. The assets included, but were not limited to the following:

- ◆ An unaccounted for estate receivable of \$7.35 millions. [Delguzzi III at * 3. [CP 1042-3, 1177, 1179, 1181, 1080-1175; Declaration of CPA Beaton & exhibits concerning \$7.35 million missing receivable.]

- ◆ The estate's missing Costa Rica farm ("Finca Delguzzi") ordered to be inventoried in 1999 [CP 1438-41] and which was also evidenced by Mr. Zeno's emailed advice about it to successor administrator, Kathryn Ellis.[CP 696;1442]
- ◆ The estate's real property in Pacific County, Washington that was in Wilbert's estate inventories and then transferred to his family without court approval, explanation or payment to the estate. [CP 1508-9, 1510, 1512 & 1636-48].³
- ◆ Checks payable to Wilbert [CP 1505-7] for \$1.466 million in December 1993 from Costa Rica asset sales, which included payments for Finca Delguzzi and other Jack Delguzzi properties in Costa Rica which were not reflected in Wilbert's accountings.

Until the party moving for summary judgment identifies sufficient portions of the record and affidavits which demonstrate the absence of a genuine issue of material fact, the burden does not shift to the party defending against the motion to demonstrate a genuine issue of material fact. Indoor Billboard / Washington, Inc. v. Integra Telcom of Washington, Inc., 162 Wn. 2d 59, 71, 170 P.3d 10 (2002). Wilbert's motion failed to shift the burden of proof. The court is required to construe all facts and inferences in favor of Martin as the nonmoving party. Michael v. Mosquera-Lacy, 165 Wn 2d 545, 548, 192 P.3d 886(2008). Since there was no evidence to establish any facts offered by Wilbert in to oppose the defense of the summary judgment motion, Wilbert failed to shift the burden to Martin, as there was no identification of any portions of the record by Wilbert that

3

Mr. Zeno argued that perhaps these missing assets were not what they appeared to be in the summary judgment hearing on August 21, 2009, but he had no evidence to support his speculation. VRP Aug 21, 2009.

demonstrated the absence of a genuine issue of material fact.

Since Wilbert offered no evidence to rebut the evidence of the many valuable missing assets and only challenged Martin's evidence with argument and ad hominem attacks, it was certainly error for the trial court to grant summary judgment as to the unadministered assets of the Jack Delguzzi estate, as Wilbert never proved administration of the missing estate and jointly owned assets.

A factually very similar situation arose with In re Dyer's Estate, 161 Wash. 498, 297 P. 196(1931), where 200 shares of corporate stock were identified and the executor declined to inventory and include that stock in the final petition. The Supreme Court held that the probate court acted properly in not vacating the Decree of Distribution, as there was no error in the Decree, but ordered the court to conduct a hearing on the ownership and probate administration of the stock. This was the same relief sought by Gary's estate's 2006 Complaint as to assets of his father's estate that were not inventoried and administered and offered as a defense to the Wilbert summary judgment motion.

In an action to determine the ownership of property which the administrator did not inventory or administer, it is necessary for the trial court to receive evidence as to the title of the property not included in the decree of distribution, since the decree was final and conclusive as to the status of the property that was included in the inventory, but was not determinative of the status of property not so included. In the Matter of the Estate of George F. Price, 53 Wn2d 393, 395, 333 P.2d

929(1959), where the opposition to hearing evidence on the ownership of the omitted property claimed that the questioned property was not “. . . within the pleadings and is a collateral attack on the decree of distribution.” The Supreme Court disagreed, holding “Had the trial court acceded to this theory, it could never have reached the unusual facts determinative of the merits of this case.” Estate of Price, supra, 395.

Just as with In re Dyer’s Estate and In the Matter of the Estate of George F. Price, supra, where the trial court was reversed for its failure to recognize that the closing of an estate without administering certain valuable assets, no order entered in this case precluded the court’s later determination of ownership and entitlement of unadministered assets, or damages for their losses, or relieve the trial court of the duty to do so.

MARTIN’S DENIED DISCOVERY MOTIONS

Mr. Zeno’s May 13, 2005 email to then-administrator Ellis that disclosed the existence of the estate’s Costa Rica farm [CP 696] was accurate. His later claim, under oath, that he did not know if all of the Costa Rica assets had been distributed on June 20, 2008 was false. What else he knew of the farm and where, and what, estate files were delivered to him by Ms. Wilbert in 2005, all justified granting Martin’s motions ordering him to complete his deposition. Denial of Martins’ motions to compel were abuses of discretion.

On May 13, 2005, Zeno sent an email to Administrator Ellis which detailed not only the existence of the estate’s un-inventoried ‘finca’ or farm, but that he had an English speaking Costa Rica contact who could assist her with the farm’s administration. [CP 1442]

On June 20, 2008, Mr. Zeno testified in deposition as follows:

Q: What Costa Rica assets were there at any time to the best of your knowledge in the Estate of Jack—that Jack Delguzzi had an interest in?

A: I don't know.

Q: And I believe that supplement to the final accounting listed -- well, it was a narrative. It wasn't really an accounting or anything, but it was a narrative. And it gave Mr. Wilbert's verbal -- there were not many numbers in it, but verbal report of the sale of some of the Costa Rica assets of the estate. Do you recall that at all? Tamarindo comes to mind for me.

A: Well, I know that there were some narratives filed on Mr. Wilbert's behalf. But -- and I believe that at least, you know, some of them must have addressed Costa Rica. But as far as what specifically they said, when they were filed, what the purpose of their filing was, I don't remember.

Q: Were those -- were those narratives or whatever dispositive of all the Costa Rica assets?

A: I don't know.

[CP 779, p. 63, ll. 7-25, 780, p. 64, l. 1]

Then in the summary judgment motion which he filed on July 24, 2009, Mr. Zeno included the same Supplement to Final Accounting and Petition for Decree of Distribution [CP 897, Exh. 6] about which he had been so vague only 13 months before, where Wilbert claimed, for the first time, that the farm belonged to the estate.[CP 927, n. 13]. The order that Zeno told Ellis about on May 13, 2005 [CP 1438] confirmed the probate court's recognition of the estate's ownership.

When it was alleged that Ms. Ellis had not properly marshaled and distributed the farm during her administration, she first argued "There was no such farm," then "There was no such order" and finally on September 26, 2008 that the farm was worthless.[CP 698] She offered only her unsupported testimony and no evidence for that conclusion

Zeno also told Ellis that there was an English-speaking attorney,

who could assist her in administering the property. He closed with a request that she get this information from him so that she could administer this farm. Had she honored his offer, the 'finca' would have been no longer an issue for her or for Mr. Wilbert. For some unknown reason, she failed to do so and was later found not to have been liable, leaving Mr. Zeno's client solely liable.

The trial court deemed that the gaps in the critical information withheld by Zeno were insufficient to require him to complete his deposition. This was an abuse of discretion. For example, who was the English-speaking attorney? What was his/her involvement or knowledge about the farm that Mr. Wilbert valued at \$150,000 in 1992? Was there any evidence in support of Ms. Ellis's speculation? The only known source of this information is Mr. Zeno.

On July 1, 2009, Ms. Laurie Wilbert, Mr. Wilbert's daughter and his office manager while he was administrator, testified that after Ms. Ellis' appointment, she had transferred the contents of a file cabinet containing three or four file drawers of estate records to Mr. Zeno for delivery to Mrs. Ellis. Mr. Zeno's discovery responses evaded and denied producing the files had been delivered to him and never produced them in response to discovery requests pursuant to CR 34. [CP 681-86, 527]

Because Laure Wilbert was not a party, and because of the possibility that Mr. Zeno's law firm, to which she transferred the files, could claim that they were files that belonged to a non-party, i.e., Ms. Wilbert,

which was Zeno's position, and so not subject to CR 34 production, a subpoena was issued and served upon Mr. Zeno's law firm. The court quashed that and also denied Martin's motion for order compelling production of these files from Zeno other client. CR 26 (b)(6) required the trial court to compel the discovery that Martin and Gary Delguzzi have been seeking since before 1996, shortly before Wilbert's discovery abuse spun the case off into years of torturous appeals and delay.

The purpose of civil discovery is to disclose to the opposing party all information that is relevant, or potentially relevant or reasonable calculated to lead to the discovery of admissible evidence in the trial at hand. . . . Where there is an indication that a serious potential exists for abuse of civil discovery, the courts are obliged to act. In re Firestorm, 129 Wn2d 130, 916 P.2d 411(1996).

Both of these acts of the trial court, in terminating Mr. Zeno's deposition early and in not ordering production of the estate files that Ms. Wilbert transferred to Mr. Zeno were abuses of discretion by the trial court. Granting Martin's discovery motions could have resolved the uncertainties of these and other issues related to the huge number of missing estate assets that were not administered.

THE ILLUSION OF PRECLUSION

Ms. Wilbert argued in her summary judgment motion in August 2009 [CP 820] that Delguzzi IV "precluded" the 2006 Complaint against the William Wilbert estate, of which she was the personal representative, by the mere mention of a "preclusive effect" as to Gary

Delguzzi's July 16, 1996 Petition for Damages⁴, although that footnote only addressed the 1996 Complaint and did not mention the 2006 Complaint. Since the probate court had assigned those claims to Gary's estate a year earlier, it no longer had jurisdiction in the probate to issue a final order that could have a "preclusive effect".

The court's prohibition of pursuit of the Wilbert claims by Ms. Ellis, and the later assignment of the claims all demonstrate that the probate court had washed its hands of the claims even before the ribbon was tied on the package with an affidavit of prejudice, blocking Judge Costello, the assigned judge, from any further action as to the claims in the 2006 Complaint on June 29, 2007. Only close attention to these details and the other history of the Delguzzi case will provide answers to its unique questions.

HISTORY OF THE DELGUZZI APPEALS

Because only passing attention was given to the elements of the "preclusive effect" noted by Delguzzi IV, the logical first step would be to look for a qualifying 'event' to satisfy the threshold requirement for preclusion.⁵

Gary Delguzzi filed a Complaint against Wilbert in 1994. He amended this pleading on July 16, 1996 with 1) a Petition for Removal

4

"We note that many of these issues overlap with those in the still-pending July 1996 complaint, as described by the parties. See note 2, *supra* (describing 1996 action). We recognize that this opinion disposing of these issues has a preclusive effect on the unresolved July 1996 action." [Delguzzi IV at n. 19.]

5

Please see "Preclusive Events" argument at page 22 of this Brief.

and 2) a Petition (Complaint) for Damages, herein “1996 Complaint” [Delguzzi I at *2], also mentioned in Delguzzi IV’s footnote 19.

Mr. Wilbert’s discovery abuse caused the dismissal of Gary’s 1996 Complaint on January 17, 1997[Delguzzi III at n. 5] when Mr. Wilbert misrepresented to the trial court Delguzzi’s responses to Wilbert's discovery. Because of that dismissal, Gary’s motion to compel discovery was continued by the trial court, as there was no matter then pending upon which to base the motion until after the reversal of the dismissal and the remand. Gary again noted his November 1996 motion to compel discovery for hearing in July of 1999, but the trial court continued the hearing until after Wilbert’s second motion to dismiss the 1996 Complaint, which was based on several preclusive doctrines, and which was granted on September 14, 1999, causing Gary to be again deprived of a hearing on his motion to compel.[Delguzzi III at *6-7 & 13-14]

Gary’s 1996 Complaint was in the trial court’s jurisdiction for only about 9 of the 54 months between January 17, 1997, the first dismissal, and August 31, 2001, when Delguzzi III reversed the second dismissal. The remainder of that 4½ years, the 1996 Complaint was solely under jurisdiction of Division II, effectively denying Delguzzi opportunity for discovery or the ability to note the case for trial. That period of appellate limbo also denied the trial court jurisdiction over those claims during Wilbert’s 1997 accounting hearing. RAP 7.2(1). Delguzzi III also held that Delguzzi had no opportunity to present his claims at that hearing and that Gary’s due process rights had been violated by the trial court’s

grant of Wilbert's second dismissal motion after the 1997 Petition for Final Accounting and Decree of Distribution hearing. The 1998 closing order resulted from that hearing and thus it could not be preclusive of Gary's claims.[Delguzzi III at *14]

The 1996 Complaint has never been tried on the merits and therefore never been resolved by a final judgment. The second dismissal based on res judicata, collateral estoppel and law of the case, was based upon Wilbert's claims that the 1997 accounting hearing and the resulting 1998 closing order precluded them. [Delguzzi III at *14-19]

Division II explained in early, great and profuse detail why no preclusion doctrines applied, as follows:

[H]e (DelGuzzi) argues that the trial court erred in dismissing on grounds of res judicata, collateral estoppel, and the law of the case doctrine. [Delguzzi III at *2]

* * *

DelGuzzi had no opportunity to compel the discovery that he claims was necessary to litigate his claim for wrongful administration of his father's estate. [Delguzzi III at *5]

* * *

[After remand from DelGuzzi-I] DelGuzzi again moved to compel discovery. But Wilbert urged the court to dismiss DelGuzzi's claim, this time based on res judicata, collateral estoppel, and law-of-the-case doctrine. Wilbert argued that, although DelGuzzi's wrongful estate administration claims had originally been dismissed as a discovery sanction, DelGuzzi was nevertheless barred from relitigating them on remand because the same issues had been decided in the probate hearing following the dismissal and before we heard the previous appeal. [Delguzzi III at *6]

* * *

A different superior court judge again dismissed Del Guzzi's claim, reasoning that at the January 21, 1997, hearing on Wilbert's final report and accounting for the estate, Del Guzzi had adequate opportunity to raise any and all claims and had lost. The superior court reasoned that at the previous probate proceeding: (1) the superior court found Wilbert's Administrator fee reasonable; (2) this finding thereby necessarily included that the Administrator did not breach his fiduciary duty to the estate; and (3) this finding

necessarily included DelGuzzi's claims of fraud/self-dealing and necessarily decided the claims in Wilbert's favor. The superior court did not address how DelGuzzi could have effectively mounted a challenge to the estate's administration without his discovery requests having been heard or granted. DelGuzzi amended his appeal to include this ruling and dismissal of his claims on remand. [Delguzzi III at *7]

* * *

(Res Judicata.) Wilbert contends that res judicata bars DelGuzzi's claims because DelGuzzi had a chance to litigate fully those claims in the Final Accounting hearing of January 21, 1997. The record is to the contrary. Because another judge had dismissed DelGuzzi's wrongful-estate-administration claims as a sanction for discovery violations, the trial court limited the January 21 hearing to Wilbert's final accounting of the estate. DelGuzzi neither presented nor had an opportunity to present his claims at that hearing. [Delguzzi IV. *4]

* * *

For the reasons we mention in our discussion of res judicata, supra, the issue before us on appeal is not the same as the issue decided at the January 21, 1997, hearing. Again, that hearing focused on the estate administrator's petition for approval of his fees and plan of distribution. It did not resolve DelGuzzi's tort claims and related issues because the previous judge had dismissed DelGuzzi's action and had not granted his motion to compel Wilbert to produce necessary documents. [Delguzzi III at *17]

As to the fourth element, it would work an injustice to apply collateral estoppel to preclude resolution of DelGuzzi's claims. First, the trial court wrongfully dismissed his claims, in part because it had the wrong documents before it. Second, Wilbert's failure to return to DelGuzzi key source documents from DelGuzzi's original administration of the estate limited his ability to participate fully in the estate accounting hearings and to challenge the accuracy of Wilbert's accounting. Without these documents, DelGuzzi could not effectively impeach or rebut testimony at the hearing that the estate's loss of millions of dollars was not attributable to Wilbert, even though some evidence could have cast doubt on Wilbert's estate administration. Application of collateral estoppel here would be manifestly unjust. [Delguzzi III at *17][Emphasis added.]

Delguzzi I & III recognized that the issues in Gary's 1996 Petition for

Damages were tort claims. The July 27, 2007 closing order⁶ [CP 1821-2] [Delguzzi IV at *1] only addressed the probate issues. [Delguzzi IV at *7] (See footnote 6 herein, infra.) No decree of distribution was ever entered for the Jack Delguzzi estate.

Wilbert's accounting hearing before Judge Leonard Costello in 1997 was the last hearing in the Jack Delguzzi probate where there was live testimony and thus the last opportunity to resolve issues of disputed material facts. The evidence from that hearing resulted in the Memorandum Decision of October 10, 1997 [CP 832] , and the Order Regarding Administrative Expense Reimbursement of June 5, 1998 [CP 838](1998 closing plan) [Delguzzi IV at *5 & 9] neither of which addressed Gary's tort claims [Delguzzi III at *17] as the evidence was restricted to probate issues as well as because Gary's Complaint was the under review and not reinstated until January 8, 1999. [Delguzzi I]

The 2007 Final Supplement (2007 closing order) could not provide resolution of the tort claims because the hearing did not include testimony, so there could be no fact finding to resolve the disputed material fact issues related to the tort claims. Also, once the claims were assigned in 2006, they were no longer the concern of the probate court.

Delguzzi IV held the 1998 closing plan was interlocutory when

6

The 2007 closing order is titled "Final Supplement to [Wilbert's] Final Report and Petition for Decree of Distribution." [Delguzzi IV at *17]

entered⁷, preventing it from the finality required to be a preclusive event. [Delguzzi IV at *15] “When an order is clearly intended to be interlocutory in nature, res judicata does not apply.” Claim and Issue Preclusion in Civil Litigation in Washington, Trautman, Philip A., 60 Wash. L. Rev. 805, p. 822 (1985).

Wilbert’s summary judgment motion correctly alleged that Gary “raised” certain issues in the probate proceeding [CP 820], but that is irrelevant. Both Gary and Mr. Wilbert made motions during the later administration of the estate, Wilbert to dismiss and Gary for partial summary judgment, which were denied. Wilbert argued in her summary judgment motion that the five-day trial in 1997 and Gary’s motions in the probate case in 2003 and 2005 had a preclusive effect because they were denied. Denial of a summary judgment motion has no preclusive effect, as it is not a final judgment on the merits, only a showing of non-entitlement to summary judgment. Claim and Issue Preclusion in Civil Litigation in Washington, supra, p. 822, citing to Leija v. Materne Bros., 34 Wn. App.825, 827, 664 P.2d 527 (1983).

Although Cummings v. Guardianship Services of Seattle, Inc., 128 Wn. App.742,110 P.3d 796 (2005) recognized that the doctrine of res judicata can apply to probate cases, it also addressed limitations, including those which blocked its application in this case:

7

The 1998 closing plan was entered during the time when dismissal of Gary's 1996 Complaint was being reviewed by Division II, so the trial court had no jurisdiction over the Complaint when the 1998 closing plan was entered on June 6, 1998. [CP 840, Ex. 2] RAP 7.2(1).

While no Washington Court has directly applied the doctrine of res judicata to final guardianship cases, it does apply to probate orders. Bostock v. Brown, 198 Wash. 288, 292, 88 P.2d 445 (1939) ⁸. * * * res judicata bars relitigation where an issue has been definitively adjudicated; ⁹ it does not apply where a plaintiff's right to recover damages "is plainly reserved from adjudication." Case v. Knight, 129 Wash. 570, 225 P. 645 (1924).

Judge Costello at the estate closing hearing on June 29, 2007, stated on the record [CP 1777-8 (Clerk's Minutes, June 29, 2007), CP 2011-12 (Judge Costello's letter of July 27, 2007 to Judge Wood)] that the Affidavit of Prejudice filed against him [CP 2022, Affidavit of Prejudice and Recusal of June 26, 2007] allowed him to continue hearing Jack Delguzzi's estate matters in Clallam County file No. 8087 and he recognized the affidavit of prejudice was effective to bar him from hearing the 2006 Complaint. He also knew that he had assigned the claims against Mr. Wilbert to Gary's estate the year before. Twenty-eight days later, on July 27, Judge Costello signed the closing order for the Jack Delguzzi estate (No. 8087). That closing order did not mention

8

Delguzzi IV, *11, also cited Bostock v. Brown, "... providing that an order approving a final report and distribution is "res judicata of all matters covered by that order and all questions that should have been raised at the hearing upon the final account and petition for distribution"). The opinion, at *7: "As of the time the court entered the 2007 closing order in the Estate in July 2007, however, the claims in the July 1996 complaint had not been resolved." Delguzzi III, at *14 also held the tort claims could not have been resolved by the 1997 hearing.

9

See also, Trautman, Philip A., Claim and Issue Preclusion in Civil Litigation in Washington, *supra*, 823, where Prof. Trautman notes that a "judgment expressly stated to be 'without prejudice' should not have preclusive effect". Certainly where the court expressly states, on the record 28 days before the entry of the 2007 closing order that it cannot rule on the tort claims, that more certain than a ruling 'without prejudice' as to its lack of a preclusive effect.

the 2006 Complaint in case No. 06-2-01085-2. Since Judge Costello held that he could not rule on the 2006 Complaint because of the Affidavit of Prejudice earlier filed against him during the hearing on the estate closing, so his entry of the 2007 closing order could not provide a preclusive event as to the 2006 Complaint. The lack of any mention of the 2006 Complaint in the July 27 closing order confirms Judge Costello's intentional withholding from ruling on those claims. His July 27 letter to Clallam County Presiding Judge Wood is another reflection of his knowledge. The 2007 closing order was not appealed by Wilbert.

PRECLUSIVE EVENTS

The threshold preclusive event that is necessary to find the application of a "preclusive doctrine" is a final order or judgment from an earlier proceeding. There are four elements required, which are:

(1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice. Pederson v. Potter, 103 Wn. App. 62, 69, 11 P.3d 833 (2000).

In this case, only element number three, the parties, is satisfied. The remaining three are notoriously and absolutely absent. In addition, the preclusive event must satisfy certain criteria:

Wash. Practice, Civil Procedure §35.23: A judicial determination must generally be (1) final and (2) on the merits to have res judicata effect.

* * *

Incomplete judgments, reserved issues. Occasionally when a trial court deliberately chooses not to address certain issues at trial, but the trial nevertheless ends in a final judgment, the courts have held that the judgment is not res judicata as to the issues not addressed. If it affirmatively appears on the record that issues that would have

properly been a part of prior litigation were in fact not tried therein, res judicata will not apply to such issues¹⁰. On occasion, the court in the first action will expressly reserve issues.

Where a trial court's ruling in the first decision is not clear, the later court is to "view all of the circumstances surrounding the controversy" in order to determine whether the issues were resolved by the first decision. Case v. Knight, supra, 574. The circumstances included Judge Costello's acknowledgment that the affidavit of prejudice against him for the 2006 Complaint barred him from hearing that case 28 days before he signed the 2007 closing order to close the Jack Delguzzi estate. Effectually, the affidavit of prejudice 'precluded' the 2007 closing order from addressing the 2006 Complaint.

The holdings in Delguzzi III and IV, the limitation of the 1997 accounting hearing to only issues in Wilbert's Petition and the 2007 closing order, where Judge Costello admitted his disability to rule, conclusively establish that the 2007 closing order cannot be constituted a "preclusive event" as to the 2006 Complaint.

FOOTNOTE 19 ALLEGES A LEGAL PRECEDENT BASED ON ISSUES AND EVIDENCE SPECIFICALLY EXCLUDED BY THE OPINION
Delguzzi IV's footnote 19 alleges a legal precedent, but one that is based on issues identified that were specifically excluded from review in that appeal: "We affirm the trial court's 2007 order to close the Estate and

Woepfel v. Simanton, 53 Wn. 2d 21, 330 P.2d 321 (1958) (trial court expressly found that no evidence was received on the issue and that the issue was not considered). Case v. Knight, 129 Wash. 570, 225 P. 645 (1924). International Development Co. v. Clemans, 66 Wash. 620, 120 P. 79 (1912), aff'd, 76 Wash. 698, 135 P. 660 (1913) (dictum).

dismiss the remaining issues presented for review as untimely.” [Delguzzi IV at *1]

Nor did the Delguzzi IV panel have Gary’s 1996 Petition for Damages (at *3, n.2) or the operative version of the 2006 Complaint (at *8, n.6) in their record on review. The decision also does not mention the assignment of the claims by the probate court one year before the 2007 closing order. Wilbert did not bring any objection to that issue to the Delguzzi IV court. Reliance on footnote 19 would thus be based on issues not reviewed (obiter dictum) and upon an incomplete record¹¹. The opinion also included another finding that is contrary to its imprecise, offhand footnote at page 7, *infra*. There thus could be no finding on the merits of the 2006 Complaint because Division II not only stated that it was not been accepted for review, but also that the issues were not resolved by the 2007 closing order, without mention or recognition that the claims had been assigned to Mr. Martin.

Where a trial court specifically stated that it would not address some claims (competency and undue influence) and then granted summary judgment that included those claims, the Supreme Court reversed, because “. . . these claims were not addressed nor could they be

11

The Delguzzi IV court did not have the 1996 Complaint in its record on appeal. See n. 2: “We describe the July 1996 complaint based on DelGuzzi v. Wilbert, noted at 108 Wn. App.1003, 2001 WL 1001082. No party attached the July 1996 petition and complaint to briefing, nor did any party provide an accurate record citation for this document.” Also missing from the record was the 2006 Complaint which was dismissed on Wilbert’s summary judgment motion. Delguzzi IV at n.6.

addressed in the summary judgment trial.” In the Matter of the Estate of Black, 153 Wn.2d 152, 171, 102 P.3d 796 (2004). These situations are so similar that there is no room for doubt that there was no legal possibility of a prior final order or judgment on either of Gary’s Complaints.

Delguzzi III could not have been more precise in its holding that the 1998 closing plan was not a “preclusive event” as to Delguzzi’s July 16, 1996 Complaint:

Because another judge had dismissed DelGuzzi's wrongful-estate-administration claims as a sanction for discovery violations, the trial court limited the January 21 hearing to Wilbert's final accounting of the estate. DelGuzzi neither presented nor had an opportunity to present his claims at that hearing. Delguzzi III at *14.

Delguzzi IV at *7, confirmed this:

As of the time the court entered the 2007 closing order in the Estate in July 2007, however, the claims in the July 1996 complaint had not been resolved.

Wilbert’s interpretation of the dichotomy between Delguzzi IV’s footnote 19 and the contrary language at page 7 was that footnote 19 trumped the wealth of case law requiring a final order or judgment on the merits in order to create an initial necessary element of preclusion is not only mistaken, but it is irrelevant. Footnote 19 referenced only the 1996 Complaint and it is the trial court’s dismissal of the 2006 Complaint that is the primary issue in this appeal. Footnote 19's lack of relevance, factual or legal support and specificity as well as its obiter dictum character renders it meaningless as well as irrelevant.

STATUTE OF LIMITATIONS AND RCW 11.96A.070(2)

The July 16, 1996 Petition for Removal, the sibling of Gary’s 1996 Complaint was held to have been mooted by the death of Wilbert in

2004 [Delguzzi IV at *8, n.5] even though Wilbert was never discharged, his death constructively removed him as administrator.

Since Mr. Wilbert was never discharged as administrator of the Jack Delguzzi estate, his (Wilbert's) estate still has continuing liability for his actions while he was the administrator of the Jack Delguzzi estate. The 1998 closing plan Delguzzi IV at *5 [CP 840(Ex. 2)] required him to continue with his duties and did not mention discharge. Only a court ordered discharge could trigger the statute of limitations. RCW 11.96A.070(2), below:

(2) 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.

Volume 15A of the Washington Practice Manual, at § 4.10, "Death-Defendant" explains the law and procedures for making a claim under these circumstances after his death, as follows:

Commencement of a claim against a would-be defendant who dies before the expiration of a limitations period is governed by the probate nonclaim statutes. RCWA 4.16.200 (limitations of actions against a person who dies before the expiration of the applicable limitations period are as set forth in RCWA chapter 11.40).

* * *

Hence, at death, the statute of limitations continues to run, and the time limits contained in the probate nonclaim statutes on the filing of claims against an estate come into play. To preserve a claim that is not already barred by the statute of limitations, it must be presented to the personal representative and filed with the court in the manner

described in RCWA 11.40.070.12

* * *

In general, a claim must be presented within the later of 30 days after the personal representative's service of actual notice to creditors or 4 months of first publication of notice to creditors. If notice is not provided, or a reasonably ascertainable creditor did not receive actual notice, the creditor must present the claim within 24 months after the decedent's death. RCWA 11.40.051. Any claim not properly presented within the designated time limits is barred, and this bar is effective against both the decedent's probate and nonprobate assets. RCWA 11.40.051(3). If the personal representative rejects the claim in whole or part, the holder must commence suit against the personal representative in the proper court within 30 days after notification of rejection, or the claim will be forever barred. RCWA 11.40.100. [Emphasis added.]

As shown above, the statute of limitations for claims against estate representatives for fiduciary duty breach remains open until the estate's representative is discharged. Once a claimant complies with the probate non-claim statute, the next trigger to a statute of limitations is RCW 11.40.100, which starts the 30 day period after the estate representative serves and files denial of the creditor's claim and, when service in compliance with that statute was accomplished, as both the court and Wilbert's attorney acknowledged, the statutes of limitation have been

12

Ms. Wilbert's summary judgment motion had a different view of the procedure and also quoted from §4.10 of Washington Practice, Vol. 15A, reading its meaning differently: "It is important to note that Wilbert's death does not toll the statute of limitations for any such claims." This generalization neglects to consider RCW 11.96A.070(2), RCW 11.40.070 and RCW 4.16.200, discussed above, which changes the applicable statute of limitations to RCW 11.40.100. [CP 825.]

tolled by the filing and service of the summons and complaint pursuant to RCW 4.16.170. [CP 1728, VRP, August 21, 2009.]

Since the probate statutes of limitation are a comprehensive scheme, they govern over the general statutes of limitation once a potential defendant dies, as Washington Practice, 15A, §4.10 points out, notwithstanding Wilbert's attempts to rewrite it. Since Mr. Wilbert never secured an order of discharge, the statute of limitations never ran for him as the applicable statute of limitations for fiduciary duty breaches, RCW 11.96A.070(2), only expires when the estate representative is discharged. Until then, the claim period remains open.

The events related to the denial of the Delguzzi creditor's claim under the non-claim statute and the filing and service of the Complaint in Clallam County Superior Court on December 5, 2006, are displayed in Martin's demonstrative time line exhibit that was referred to at the summary judgment hearing. [Appendix 4; VRP, August 21, 2009.]

After Ms. Wilbert denied Gary's Delguzzi's estate creditor's claim, and included notice which started the thirty day period after which the claim would be time-barred, the creditor's claims became the 2006 Complaint filed in Clallam County. Ms. Wilbert was then served four

times, by mail on March 3, 2007, by constructive (estoppel) service upon Ms. Wilbert's attorney on March 5th, 2006, after he had agreed to accept and acknowledge service and then refused to do so,¹³ and then on March 6, service again was accomplished when he accepted and acknowledged the service, as he had earlier agreed to, which was also the date of the first publication of the summons.[CP 1696, 2075, 2077, 2080, 2081.]

In November 2007, eight months after service of the Summons and Complaint had been accomplished on Ms. Wilbert, her attorney moved to change venue of the 2006 Complaint from Clallam to King County. Gary's estate did not oppose the venue change, but requested that the 1996 and 2006 Complaints be consolidated.

Delguzzi IV, in addressing that issue, held that the venue motion had not been timely appealed and that therefore that court would not consider the venue of the 1996 Complaint on appeal. [Delguzzi IV at *22-23.] The 2006 Complaint, now cause number 08-2-10290-4 SEA, was moved to King County by Wilbert's motion, having previously complied

13

Crisman v. Crisman, 85 Wn App. 15, 931 P.2d 163(1997).

with the probate non-claim statute and the other procedures that tolled the statute of limitations.

Once the preclusion confusion is examined and applied to the facts as determined by prior appellate opinions, application of any preclusion doctrine as to the 2006 Complaint can be seen to be an illusion, unidentified and unrecognized by precedent or statute.

With the 2006 Complaint filed and served before the Clallam County court entered its closing order for the Jack Delguzzi probate, there has been no gap in the jurisdiction of the courts over Mr. Wilbert and his estate as to the Delguzzi allegations of breaches of fiduciary duty during the period between the first service of the 1994 Complaint and the July 26, 2007 closing order of the Jack Delguzzi estate. The statute of limitations was tolled as to all claims in the 2006 Complaint after service and filing by operation of the comprehensive probate statutes of limitation.

STATUTE OF LIMITATIONS – ESTOPPEL

Gary's 2006 Complaint, at paragraphs 14, 18 and 19 [CP 6-32, 1885] details several fiduciary relationships between Gary and Mr. Wilbert. Paragraphs 15 and 16 list general partnerships of which Gary was a

partner with his father and into which Mr. Wilbert succeeded as administrator of Gary's father's estate, which is another fiduciary relationship. The entire complaint is rife with allegations that Wilbert concealed, and misrepresented the assets under his management and control while he was acting as fiduciary.

The finder of fact must determine the impact of fraudulent fiduciary concealment on the statute of limitations, as the issue is factual rather than legal and not to be decided by summary judgment:

Because the underlying motion is a summary judgment motion, we must determine whether the court erred by determining that there was no issue of material fact concerning Nick's claim of fraudulent concealment.

* * *

The Bank argues that the failure to provide information does not establish fraudulent concealment. But Thorman held that silent or passive conduct is not deemed fraudulent unless there is a fiduciary relationship; under these circumstances, there is a duty upon the defendant to make a disclosure. Thorman, 421 F.3d at 1096. * * * Nick's duty to be diligent relies on the factual determination as to when Nick knew, or should have known, the elements of a cause of action. The question as to what Nick knew is a question of material fact that cannot be resolved here. August v. U. S. Bancorp, 146 Wn. App. 328, 348-9, 190 P.3d 86 (2008).

Since fraudulent fiduciary concealment is an issue of fact, it was an error of law for the trial court to decide if the facts constituted a basis for estoppel barring Wilbert's statute of limitations defense by

motion.

WILBERT'S CR 12 SUMMARY JUDGMENT DEFENSES

Two of Wilbert's summary judgment challenges to the 2006 Complaint were "failure to properly plead" and "no facts have or can be adduced," which is usually called "failure to state a claim upon which relief can be granted" under CR 12(b)(6) or if under CR 12(c), a motion to dismiss on the pleadings.

Neither of these challenges was preceded by a prior defense motion for more specificity under CR 12(e) even though the Complaint was amended twice, without objection [CP 1876, 1885]. Nor did Wilbert seek to compel discovery or take a single deposition before bringing his motion, although the motions require evidence to establish the non-existence of a material fact and Wilbert offered none. Bly v. Pilchuck Tribe No. 42, 5 Wn. App. 606, 607, 489 P.2d 937 (1971).

Even a very quick review of the thirty-nine detailed factual allegations in the Complaint firmly establishes foundation for multiple causes of action and the evidence offered by Martin's motion for partial summary judgment [CP 93, 106, 391, 393] and in Martin's response to Wilbert's summary judgment motion [CP 1037-1653] was unmet by

opposing evidence from Wilbert, so that Martin's evidence established material unopposed facts, which is sufficient to require the allegations of the Complaint be resolved by trial and not by motion, as factual issues cannot be resolved by a CR 12 motion. Barnum v. State, 72 Wn. 2d 928, 435 P.2d 678 (1967).

The summary and analysis of the Complaint in Delguzzi IV's note 2 constitutes "law of the case," which must be applied to the Wilbert summary judgment allegations. Division II saw no issue of pleading insufficiency in their analysis of the claims relating to the inadequacy of the pleadings or failure to state a claim and had no problem with summarizing the claims in the complaints and reducing them to their core elements.[Delguzzi IV at *3, n.2] If Wilbert could not do so, it was because she did not look at Delguzzi IV. Granting summary judgment on these CR 12 or "preclusive effect" grounds would require the trial court to impermissibly overrule the law of the case as stated in Delguzzi IV. See State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992). RAP 10.4(h).

On June 24, 2010, the Supreme Court confirmed that "Under CR 12(b)(6) a plaintiff states a claim upon which relief can be granted if it is possible that facts could be established to support the allegations in the

complaint.” McCurry v. Chevy Chase Bank, FSB, ___ Wn.2d ___, ___ P.3d ___, No. 81896-7, at *3, June 24, 2010, citing to Halvorson v. Dahl, 89. Wn.2d 673, 674, 574 P.2d 1190 (1978). That holding, considered in light of Delguzzi’s IV’s footnote 2 analysis of the claims in the 2006 Complaint raises those allegations well above the CR 12 standard for granting dismissal, confirmed earlier this year.

DISPUTED MATERIAL FACTS EXIST

For the purposes of a CR 12 motion, the truth of every fact well pled by the opponent is presumed true, as is the untruth of the moving party’s own allegations, which have been denied. Pearson v. Vandermay, 67 Wn.2d 222, 407 P.2d 143 (1965). The court must consider even hypothetical facts offered by plaintiff as probative. Gorman v. Garlock, 155 Wn.2d 198, 118 P.3d 311 (2003). Wilbert never even tried to meet her burden of proof with evidence. The same evidentiary materials from Martin that block the application of the Wilbert CR 12 defenses also must be considered to establish multiple disputed material facts for reversal of the summary judgment dismissal.

It is not required that the plaintiff prove that the allegations in the complaint are true in response to a CR 12 motion. If disputed, that issue

cannot be resolved by a motion. If the defense wishes to deny the factual allegations, it is a matter for trial. Knapp v. Order of Pendo, 36 Wash. 601, 605, 79 P. 209 (1904). In order to prevail on a motion for judgment on the pleadings or failure to state a claim for which relief can be granted, the proof offered by the defending party must establish the nonexistence of an issue of material fact which is necessary to prove the plaintiff's case.

“CR 12(b)(6) motions should be granted ‘sparingly and with care’ and ‘only in the unusual case in which plaintiff included allegations which show on the face of the complaint that there is some insuperable bar to relief.’” Paradise, Inc., v. Pierce County, 124 Wn App. 758, 767, 102, P.3d 173(2004).

Wilbert offered no evidence of any kind in support of her CR 12 summary judgment motion, and certainly made no showing of an “insuperable bar” so the grant of summary judgment on that issue is reversible.

LATCHES

Wilbert urges that latches barred Gary's complaint for damages from trial, citing Marriage of Dicus, 10 Wn. App.347, 40 P.3d 1185(2002) quoting from the head note. Deeper within the case, at 357, is a explanation of the elements of latches, below:

A person defensively asserting laches must establish (1) the claimant had knowledge of the facts constituting the cause of action or a reasonable opportunity to discover such facts; (2) unreasonable delay on the part of the claimant in commencing the action; and (3) damage to the person asserting laches.

Laches is the common law remedy for claims seeking equitable remedies that were not timely pursued. Since Gary's 1996 Complaint had secured unbroken jurisdiction over Wilbert as to the tort claims since it was filed and since he sought only money damages and since it was filed in 1994 and he offered no evidence of damages, laches is not applicable all of these reasons. In re Marriage of Sanborn, 55 Wn. App.124, 777 P.2d 4 (1989).

Even if Wilbert's laches defense was not barred by a failure to prove the necessary elements of the doctrine, RCW 4.16.170 tolls the statute of limitations during litigation and constitutes another impossible hurdle for this defense.

CONCLUSION

If the imprecise language, lack of probate court jurisdiction and foundation that define and limit the impact footnote 19 of the Delguzzi IV opinion could be construed to preclude Gary Delguzzi's 1996 Complaint, that would not affect the later 2006 Complaint and it would

not permit Wilbert's summary judgment to confirm the massive mismanagement and misappropriation of the substantial assets that Martin presented in Response to the Wilbert motion. The evidence surrounding those assets was not opposed with a scintilla of evidence from Wilbert and so the dismissal must be set aside on remand for trial.

The length and complexity, both factual and legal, of this case have confused creditors and court for the entire period of the administration of William Wilbert administration. That was an intentional and consistent strategy and now it is being utilized by his estate. The stubborn and persistent fiduciary refusals to provide full and fair discovery has made that strategy possible earlier, but now the tide has turned. The large value of the unaccounted for and undistributed assets can no longer be concealed or diminished by the persistent discovery abuse and ad hominem attacks on Gary Delguzzi, his successors and representatives.

Respectfully submitted this July 9, 2010.



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Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that I caused to be served a copy of the foregoing to the parties/attorneys as below listed by placing such in the U. S. Mail, with 1st class postage affixed thereto on this



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NO. ~~6585~~ 64231-6

COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION I

DAVID L. MARTIN
APPELLANT

VS.

LORETTA D. WILBERT, AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF WILLIAM E. WILBERT AND INDIVIDUALLY
RESPONDENTS

**APPENDIX TO
APPELLANT'S BRIEF**

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Appendix 1(Delguzzi I)

1999 WL 10081(Wn. App. Div. 2)

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Page 1

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NOTE: UNPUBLISHED OPINION, SEE RCWA
2.06.040

No. 21752-0-II.

Jan. 8, 1999.

Court of Appeals of Washington, Division 2.
Jack J. DELGUZZI, Deceased, Gary DelGuzzi and
Charles M. Cruikshank, III, Appellants,

v.

William E. WILBERT, individually and as administrator of the Estate of Jack DelGuzzi; Loretta Dickson Wilbert, spouse of William E. Wilbert; William E. Wilbertbroker, Inc., a Washington corporation; William E. Wilbert, P.S., Inc., a Washington corporation, Cedarwood Properties, Inc., a Washington corporation; W and S Investments, Inc., a Washington corporation; Hemisphere, Ltd., a Washington corporation; 400430 D.C. Ltd., a British Columbia, Canada corporation; 413505 T of G Holdings D.C., Ltd., a British Columbia, Canada corporation; William Dickson Wilbert, and Kathleen Ann Wilbert, husband and wife; Daniel Gerard Jarboe and Jane Doe Jarboe; Laure Anne Wilbert and John Doe Wilbert, husband and wife, Ellen D. Clark and Davis Wright Tremaine, Allen D. Clark and Jane Doe Clark; Davies, Wright AMD Tremaine, a Washington general partnership; Gary Parish and Susan Parish, husband and wife, William A. and Michel Shao Hai Carlsen, husband and wife; Gerald H. Shaw and Jane Doe Shaw, husband and wife; Paul R. Cressman and Short And Cressman, a Washington general partnership; Wilbert F. Hammond and Jane Doe Hammond, husband and wife; Lockwood Foundation; Western Surety Company, a company licensed to do business in the State of Washington, John Doe, I through John Doe XX and Jane Doe I through Jane Doe XXV; ABC Corporations I through XX; William W. Wilbert, Trustee of the Irrevocable Trust of Gary DelGuzzi; William E. Wilbert, as Trustee of the Trust of Loretta Dickson Wilbert; Western Surety Company; and Toth Wilbert & Hannon, an unknown entity; Sosumi, Inc., a Washington corporation, respondents.

Appeal from Superior Court of Clallam County, Docket No: 80-8-7. Judgment or order under review, Date filed: 02/10/97, Judge signing: Hon. William E. Howard.

Charles M. Cruikshank Iii, Attorney At Law, 108 S Washington St # 306, Seattle, WA 98104, for appellant(s).

Gary J. DelGuzzi, 1306 Western Avenue # 402, Seattle, WA 98104, pro se.

Larry N. Johnson, , Chicoine & HallettPSWaterfront Plc 1 Ste 803, 1011 Western Ave, Seattle, WA 98104, and G.M. Zeno Jr., Davidson Czeiler eta, 1520 Kirkland Way Ste 400, P.O. Box 817, Kirkland, WA 98083-0817, for respondent(s).

HOUGHTON

*1 Gary DelGuzzi appeals from the trial court's dismissal of his claims against William E. Wilbert, several of Wilbert's adult children, and two corporations wholly owned by the children.^{FN1} Gary DelGuzzi and his attorney, Charles Cruikshank, further appeal the trial court's imposition of fees and sanctions against them. We affirm the trial court's imposition of fees and sanctions regarding claims against the Wilbert children, reverse the trial court's dismissal of claims and imposition of fees and sanctions regarding William E. Wilbert, and remand for further proceedings.

FN1. The Wilbert children are Laure Anne Wilbert, Daniel G. Wilbert, and William D. Wilbert. Their corporations are SoSumi, Inc., and Puget Sound Property Consultants, Inc. We refer to these respondents as the Wilbert children.

Not Reported in P.2d, 93 Wash.App. 1048, 1999 WL 10081 (Wash.App. Div. 2)
(Cite as: 1999 WL 10081 (Wash.App. Div. 2))

FACTS

Jack DelGuzzi died in 1978, appointing his son and sole heir, Gary DelGuzzi (DelGuzzi), as personal representative of his estate. DelGuzzi served as personal representative until August 13, 1982, when he resigned in favor of the current administrator, William E. Wilbert (Wilbert). In 1994, DelGuzzi, through his counsel Charles Cruikshank (Cruikshank), served a complaint on Wilbert.^{FN2} The complaint accused Wilbert, who is a real estate agent and developer, of breach of fiduciary duty, self-dealing, and failure to properly account for estate assets. It requested an accounting and the return of any improper fees, charges, and distributions. DelGuzzi amended his complaint several times.

FN2. The first complaint was never filed.

The second amended complaint, dated September 14, 1994, named additional defendants. The additional defendants included the Wilbert children, who are all licensed real estate agents. All of the Wilbert children performed services for the estate and were compensated by the estate. These services included real property sales, property development, property management, appraisal work, and clerical and administrative services. In addition to cash payments for commissions and fees, at least one of the children was compensated with two parcels of real property of the estate.

The second amended complaint requested orders voiding transfers of estate assets to Wilbert, his family members, and their related corporate entities, and removing Wilbert as administrator. Wilbert moved to dismiss based upon lack of jurisdiction. The jurisdictional hearing did not occur until almost two years later, and the motion was denied.

DelGuzzi filed another amended complaint on July 16, 1996. It separated plaintiff's claims into two separate petitions. The first petition (removal petition) requested orders removing the administrator, directing him to render an accounting, appointing a

successor, and for other related relief under RCW 11.96.020, .070, .080, .140, and 11.68.070. The trial court set an evidentiary hearing on the motion to remove the administrator for January 21, 1997.

The second petition (damages petition) alleged tort claims against the administrator for various breaches of fiduciary duty, violation of a court order requiring reporting and approval of administrative fees, using alter ego corporations to conceal estate transactions, improperly borrowing plaintiff's separate trust fund assets to pay estate liabilities, and failing to close the estate in a timely manner. In his damages petition, DelGuzzi requested an order setting a trial date on damages, but no date was ever set.

The Wilbert Children's Motion to Dismiss

*2 On November 15, 1996, the Wilbert children's counsel sent a letter to Cruikshank requesting that he drop them from the lawsuit because the complaint failed to state a legally cognizable claim against them. The letter warned that if the claims were not dismissed voluntarily, the Wilbert children would move for dismissal and seek CR 11 sanctions. Cruikshank did not respond to the letter. On December 18, 1996, the Wilbert children filed a motion to dismiss and for CR 11 sanctions.

Wilbert's Motion for Sanctions

On November 8, 1996, Wilbert served his first set of interrogatories on DelGuzzi. DelGuzzi's responses were due on December 9, 1996. CR 33(a). On that day, Cruikshank informed Wilbert's counsel that he would serve partial responses the following day and the remainder within a week. The next day, Cruikshank served only a list of objections to the interrogatories. The parties met and discussed the objections. Wilbert then filed a motion to compel responses to the interrogatories. DelGuzzi filed a motion to extend time to respond.

On December 17, 1996, the parties met and entered

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into an agreement on several matters: each side would continue its respective motion (to compel discovery and extend time); DelGuzzi would abandon his motion to compel discovery; ^{FN3} and, DelGuzzi would provide full and complete answers to Wilbert's interrogatories by January 2, 1997.

FN3. DelGuzzi first served interrogatories and requests for production on September 3, 1996. He moved for an order compelling discovery and for discovery sanctions on November 7, 1996.

On December 30, 1996, Cruikshank asked Wilbert's counsel for an extension until January 3, 1997 to provide the responses. Wilbert's counsel agreed, and Cruikshank timely served the responses. The responses were 36 pages of objections and answers. A response to each of defendant's 85 interrogatories was provided, but many of the answers were vague or did not provide the specific information requested. Many of the responses stated that specific information could not be provided because of Wilbert's failure to provide discovery to DelGuzzi.

On January 13, 1997, Wilbert filed a motion for sanctions under CR 37(d) for evasive and misleading discovery. Wilbert also requested CR 11 sanctions, claiming that DelGuzzi's interrogatory responses showed his complaint was not well grounded in fact when filed. The motion stated that a hearing was set for January 21, 1997 on DelGuzzi's claims. It did not distinguish between the removal petition, set for hearing on January 21, and the damages petition, for which no trial date had been set.

On January 15, 1997, DelGuzzi moved to compel discovery. He claimed that Wilbert had failed to properly respond to interrogatories and had denied that business records existed for many of the estate's corporate interests. He further claimed that Wilbert had repeatedly failed to produce source documents for his estate reports and accountings, such as bank statements, check registers, deposit books, and cash journals. DelGuzzi's motion to

compel was noted for hearing on January 17, 1997, the same day that Wilbert's and the Wilbert children's motions for sanctions were to be heard. Because of its disposition of the defendants' motions, the trial court did not rule on DelGuzzi's motion to compel.

Trial Court Rulings

*3 At the January 17, 1997 hearing, the trial court granted the Wilbert children's motion, dismissing them from the lawsuit and awarding them fees and costs of \$10,174.45 under CR 11. The monetary sanction was assessed solely against Cruikshank. The trial court dismissed the claims both on the pleadings, under CR 12(c) and 9(b), and on summary judgment, under CR 56.

The trial court also granted Wilbert's motion and dismissed all of DelGuzzi's claims against Wilbert as a sanction under CR 37(d) and CR37(b)(2)(C). The trial court found that Wilbert incurred a total of \$183,867.53 in expenses in defending the action and ordered a \$30,000 sanction for violations of CR 37(d) and CR 11. The trial court assessed the monetary sanction against both DelGuzzi and Cruikshank.

Both Cruikshank and DelGuzzi appeal.

ANALYSIS

Dismissal of Claims Against the Wilbert Children and Award of CR 11 Sanctions

Cruikshank does not challenge the trial court's dismissal of the claims against the Wilbert children, but he argues that the sanctions imposed were improper and unreasonable. He argues that because the allegations against the Wilbert children were only legally insufficient but not factually inaccurate, CR 11 sanctions were improper. He also claims that the trial court erred in dismissing the claims and imposing sanctions before affording DelGuzzi

Not Reported in P.2d, 93 Wash.App. 1048, 1999 WL 10081 (Wash.App. Div. 2)
(Cite as: 1999 WL 10081 (Wash.App. Div. 2))

full discovery. Finally, he claims that the amount of the sanction was unreasonable.

A court's imposition of CR 11 sanctions is reviewed for abuse of discretion. *Biggs v. Vail*, 124 Wash.2d 193, 197, 876 P.2d 448 (1994) (citing *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 338-39, 858 P.2d 1054 (1993)). A trial court abuses its discretion when its order is manifestly unreasonable or based upon untenable grounds. *Fisons*, 122 Wash.2d at 339, 858 P.2d 1054.

CR 11 requires that pleadings signed by an attorney be well grounded in fact, warranted by law, and based upon reasonable inquiry. Before imposing sanctions, the trial court must find both that a complaint lacks a factual or legal basis and that the attorney who signed and filed the complaint failed to conduct a reasonable inquiry into its factual and legal basis. *Bryant v. Joseph Tree, Inc.*, 119 Wash.2d 210, 220, 829 P.2d 1099 (1992). The reasonableness of an attorney's inquiry is evaluated by an objective standard. *Bryant*, 119 Wash.2d at 220, 829 P.2d 1099 (citing *Miller v. Badgley*, 51 Wash.App. 285, 299-300, 753 P.2d 530, review denied, 111 Wn.2d 1007 (1998)). The court should inquire whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified, considering such factors as the time available to the attorney, the complexity of the factual and legal issues, and the need for discovery to develop factual circumstances underlying a claim. *Bryant*, 119 Wn.2d at 220-21.

*4 Here, Cruikshank had ample time to determine whether claims against the Wilbert children were appropriate: the complaint was first filed in February 1994, and the Wilbert children were not named as defendants until September 1994. Information about the work they did for the estate was provided to DelGuzzi in December 1994, almost two years before they asked to be voluntarily dropped from the lawsuit.

Although Cruikshank asserts that he needed addi-

tional discovery to substantiate his claims, he never presented a cognizable legal theory under which the Wilbert children could be liable to DelGuzzi. They had no fiduciary duty to DelGuzzi and therefore could not be liable for "selfdealing," as DelGuzzi's complaint alleged. And if DelGuzzi were bringing a fraudulent transfer claim, he failed to do so with the particularity required by CR 9(b), that is, he failed to specifically identify a single parcel of real property as having been fraudulently transferred and presented no evidence suggesting the Wilbert children intentionally participated in a scheme to defraud DelGuzzi. See RCW 19.40 et seq. (outlining fraudulent transfer claims); *Park Hill Corp. v. Don Sharp, Inc.*, 60 Wash.App. 283, 287-88, 803 P.2d 326 (fraudulent transfer claim requires intent to defraud), review denied, 117 Wash.2d 1005, 815 P.2d 265 (1991); *Deyong Management, Ltd. v. Previs*, 47 Wash.App. 341, 346-47, 735 P.2d 79 (1987). Under these circumstances, a reasonable attorney would not have been justified in naming the Wilbert children defendants.

As required before imposing sanctions, the trial court specifically found that DelGuzzi's complaint against the Wilbert children was legally and factually insufficient and made without reasonable inquiry. Cruikshank's argument that sanctions are not appropriate where a claim is not factually inaccurate but is merely legally insufficient is contradicted by the plain text of CR 11. FN4 His contention that he should have been permitted additional discovery before sanctions were imposed fails precisely because the insufficiency of his pleading is legal rather than factual. Cruikshank's purpose of naming the Wilbert children to acquire jurisdiction over estate property they may have improperly received is not legally cognizable. The trial court did not abuse its discretion in finding that Cruikshank both failed to conduct a reasonable investigation and made legally and factually insufficient claims.

FN4. "The signature [on a pleading] of a party or of an attorney constitutes a certificate by the party or attorney that ... to the

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(Cite as: 1999 WL 10081 (Wash.App. Div. 2))

best of the party's or attorney's knowledge, information, and belief ... it is well grounded in fact and is warranted by existing law....” CR 11.

If CR 11 is violated, a court may impose sanctions, including the reasonable expenses incurred by the other party as a result of offending pleading. CR 11. Fees granted under CR 11 must be limited to those amounts reasonably expended in responding to the sanctionable filing. *MacDonald v. Korum Ford*, 80 Wash.App. 877, 892, 912 P.2d 1052 (1996). Here, the sanctionable conduct was naming the Wilbert children as defendants without investigating whether there was a legal basis for doing so. Cruikshank offers no arguments in support of his assertion that \$10,174.45 is not reasonable. Therefore the trial court did not abuse its discretion in imposing the entire amount of fees incurred by the Wilbert children as a sanction.

Dismissal of Claims Against Wilbert and Award of CR 11 Sanctions

1. Dismissal as a Discovery Sanction

*5 Cruikshank next contends that the trial court erred in dismissing DelGuzzi's claims as a discovery sanction under CR 37(d). He asserts that the trial court's decision was improper because it was based upon factual errors, because the trial court failed to find prejudice and willfulness, and because no prior discovery order had been entered. Discovery sanctions under CR 37, like sanctions under CR 11, are reviewed for abuse of discretion. *Rhinehart v. Seattle Times*, 59 Wash.App. 332, 339, 798 P.2d 1155 (1990), review denied, 124 Wash.2d 1010, 879 P.2d 293, cert. denied, 513 U.S. 1017, 115 S.Ct. 578, 130 L.Ed.2d 494 (1994). Because dismissal is the most severe sanction a court may impose, its use must be carefully considered by the trial court to assure that it is merited. *Anderson v. Mohundro*, 24 Wash.App. 569, 575, 604 P.2d 181 (1979), review denied, 93 Wn.2d 1013 (1980).

a. Factual Errors

Cruikshank asserts that the trial court was mistaken as to two important factual issues when it ordered dismissal of DelGuzzi's claims:

- (1) the court believed that the January 21, 1997 evidentiary hearing encompassed both the removal petition and the damages petition; and (2) the court was given the wrong document to review as DelGuzzi's responses to Wilbert's interrogatories.

DelGuzzi's removal petition was based upon RCW 11.96.020, .070, .080, .140, and 11.68.070. Those provisions permit interested persons to petition for a declaration of rights, including orders that the personal representative do or abstain from doing any particular fiduciary act. RCW 11.96.070(b), .080. An interested party may also petition for removal of the personal representative. RCW 11.68.070. Grounds for removal include waste, embezzlement, mismanagement, fraud, incompetence, neglect, or other reasons deemed sufficient by the court. RCW 11.28.250. The court has discretion to order removal of the personal representative if “it appears that said personal representative has not faithfully discharged said trust or is subject to removal for any reason specified in RCW 11.28.250.” RCW 11.68.070.

Neither party addresses what level of proof was required at the removal hearing and whether the amount and type of proof would substantially differ from that presented at the hearing on the damages petition.^{FN5} All of Wilbert's interrogatories specifically referred to the allegations contained in the damages petition. The trial court appears to have been unclear as to the scope of the January 21st hearing^{FN6} and never clearly expressed its position as to which claims that hearing was to encompass.^{FN7}

FN5. Wilbert assumes that all of the allegations made in the petition for damages would also have been presented at the removal hearing.

Not Reported in P.2d, 93 Wash.App. 1048, 1999 WL 10081 (Wash.App. Div. 2)
(Cite as: 1999 WL 10081 (Wash.App. Div. 2))

FN6. At the hearing, Cruikshank specifically informed the court that the motion to remove Wilbert was scheduled for the next court date, but no hearing had yet been set for the petition for damages. The court then asked the other two attorneys what they thought was to occur on January 21st:

THE COURT: What do you think is scheduled to happen on Tuesday?

MR. ZENO: My own understanding is that, and I'm not the best one to tell you because I didn't appear in this case until the fall, but my understanding is that there's a hearing on the plaintiff's motion to remove the personal representative....

....

THE COURT: ... I heard Mr. Cruikshank say that there was not going to be a trial on Tuesday. That there was only his motion to remove the personal representative and trial would come at a subsequent time. And so I need to know what your position is on that.

MR. JOHNSON: My understanding from your order, your Honor, is that you have set a hearing and an evidentiary hearing of Mr. Cruikshank to carry his burden to establish the allegations in his petition to justify removal of Mr. Wilbert as administrator are [sic] established and to give Mr. Wilbert the opportunity to defend against those allegations.

... All of [the allegations] are directed towards supposed bad acts or acts of Mr. Wilbert as administrator and that I assume he is attempting to utilize those to justify removal of Mr. Wilbert.

FN7. The court stated:

Now, I understand contrary to what Mr.

Cruikshank has just argued that on Monday we are going to have or Tuesday we have scheduled a trial. The trial is on the petition of Mr. DelGuzzi ... to have the personal representative of the estate removed. In doing that, the plaintiff has a fairly heavy burden [T]he plaintiff can't simply make the 56 factual allegations ... and stand on those facts and not tell the defendants the basis for those facts.

Although the court appears to contemplate a hearing on the removal petition, the 56 factual allegations were contained in the damages petition.

Also the trial court was given the wrong document to review as DelGuzzi's answers to Wilbert's interrogatories. Wilbert accurately quoted several interrogatories and DelGuzzi's responses in his memorandum supporting the motion, but he stated that DelGuzzi's responses were attached as exhibit H. Exhibit H was not DelGuzzi's 36 pages of objections and responses dated January 3, 1997, but consisted of DelGuzzi's four pages of objections and responses to defendant's first request for production of documents, also dated January 3, 1997.^{FN8}

FN8. At oral argument, Wilbert acknowledged that the wrong responses were attached to the motion for sanctions, but claimed that the correct responses were attached to DelGuzzi's motion for reconsideration. The motion for reconsideration was not included in the appellate record. But our analysis would not change even if the trial court had reviewed the correct document.

*6 It appears that the trial court was mistaken, or at best unclear, as to the two factual issues Cruikshank raised. This confusion in the record leads us to hold that the trial court failed to exercise its discretion on reasonable grounds.

Not Reported in P.2d, 93 Wash.App. 1048, 1999 WL 10081 (Wash.App. Div. 2)
(Cite as: 1999 WL 10081 (Wash.App. Div. 2))

b. Due Process

The choice of what sanctions to impose for a discovery violation is within the trial court's discretion. *Peterson v. Cuff*, 72 Wash.App. 596, 601, 865 P.2d 555 (1994) (citing *Rhinehart v. KIRO, Inc.*, 44 Wash.App. 707, 710, 723 P.2d 22 (1986), review denied, 108 Wn.2d 1008 (1987)). Constitutional due process, however, limits the circumstances under which a court can dismiss a plaintiff's claims as a discovery sanction. *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wash.App. 223, 227, 548 P.2d 558 (citing *Pioche Mines Consol., Inc. v. Dolman*, 333 F.2d 257 (9th Cir.1964), cert. denied, 380 U.S. 956 (1965)), review denied, 87 Wn.2d 1006 (1976).

Due process requires that a trial court find "a willful or deliberate refusal to obey a discovery order, which refusal substantially prejudices the opponent's ability to prepare for trial" before dismissing an action. *Peterson*, 72 Wash.App. at 601-02, 865 P.2d 555 (quoting *Associated Mortgage Investors*, 15 Wash.App. at 228-29, 548 P.2d 558). The trial court must make it clear on the record whether the factors of willfulness and prejudice are present before dismissing plaintiff's claims. *Peterson*, 72 Wash.App. at 559, 864 P.2d 384 (citing *Snedigar v. Hoddersen*, 114 Wash.2d 153, 170, 786 P.2d 781 (1990)). The court must also consider whether lesser sanctions would suffice. *RCL Northwest, Inc. v. Colorado Resources, Inc.*, 72 Wash.App. 265, 271-72, 864 P.2d 12 (1993) (quoting *Snedigar*, 114 Wash.2d at 169-70, 786 P.2d 781).

Here, the trial court considered the issue of prejudice, although without making an express finding on the record. The court noted that trial was set for the next business day, discovery had not been complied with, and DelGuzzi had not sought a protective order or a continuance. But the trial court did not consider willfulness. Nonetheless, a violation is willful and deliberate if it is done without reasonable excuse. *RCL Northwest*, 72 Wash.App. at 272, 864 P.2d 12 (citing *Rhinehart*, 59 Wash.App. at 339, 798 P.2d 1155). Cruikshank presented several

excuses: he had been unable to supply complete answers because Wilbert, who had all of the estate's accounting records, failed to comply with discovery.^{FN9} He was also disadvantaged in discovery because his client was very ill and suffered from memory problems.^{FN10} He had only a few months to pursue discovery, not a few years, as defendants alleged.^{FN11}

FN9. Wilbert claims to have completely answered these interrogatories and made available all of the estate documents for inspection. The court never considered DelGuzzi's motion to compel or made any findings regarding Wilbert's discovery compliance.

FN10. DelGuzzi's illness requires him to take up to 16 different medications daily, including tranquilizers. He suffers from confusion, memory loss, disorganization, and decreased comprehension and concentration. These problems were apparent during his deposition.

FN11. Cruikshank asserts that defendants had delayed the hearing on their jurisdictional motion for almost two years, until September of 1996. Cruikshank did not pursue discovery until after that motion was denied.

*7 The trial court noted that having an ill client must have impeded Cruikshank's ability to handle the case, but it did not consider the reasonableness of Cruikshank's other excuses. The court summarily stated that Cruikshank had failed to comply with his obligation under the court rules, without discussing or inquiring into the reasons for the failure. Because the trial court failed to consider the reasonableness of Cruikshank's excuses and the willfulness of his conduct, the trial court failed to comply with due process requirements.

The trial court also failed to adequately consider whether a sanction short of dismissal would have

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(Cite as: 1999 WL 10081 (Wash.App. Div. 2))

sufficed. See *Peterson*, 72 Wash.App. at 601, 865 P.2d 555 (citing *Snedigar*, 114 Wash.2d at 170, 786 P.2d 781). The trial court discussed only two options: Dismiss the action, one, or try to put the burden on the trial judge on Tuesday of identifying what information plaintiffs could present that was not included in the failure to respond. I think those interrogatories pretty much cover every single thing that the plaintiffs could produce at any trial. For that reason, I'm going to grant the request to dismiss.

As discussed above, the trial court apparently believed that all of DelGuzzi's claims were set for hearing on January 21st (both the removal petition and the damages petition). The trial court erred in dismissing the claims that were not set for trial, as defendants were not yet substantially prejudiced in their trial preparation. As a lesser sanction, the trial court could have precluded evidence for which responses were inadequate at the removal hearing and ordered responses by a reasonable date before the trial on the damages petition. Because the trial court apparently considered lesser sanctions based upon its belief that all of plaintiff's claims were set for hearing on January 21st, its ruling was based upon untenable grounds.

Moreover, although our courts have not addressed this issue, courts in other jurisdictions have held that dismissal is not warranted absent a finding of willfulness or fault on the part of the party itself rather than the party's attorney. See, e.g., *Birds Int'l Corp. v. Arizona Maintenance Co.*, 135 Ariz. 545, 662 P.2d 1052, 1054-55 (1983); *Cole v. Bayley Prods., Inc.*, 661 So.2d 1299, 1299-1300 (Fla.App.1995); *LeBlanc v. GMAC Fin. Servs.*, 695 So.2d 1106, 1108 (La.App.1997); *Nevada Power Co. v. Fluor Illinois*, 108 Nev. 638, 837 P.2d 1354, 1359 (1992); *Zaccardi v. Becker*, 88 N.J. 245, 88 N.J. 245, 440 A.2d 1329, 1332-33 (1982); *In re Barnes*, 956 S.W.2d 746, 748 (Tex.App.1997). Here, the trial court expressly stated that DelGuzzi was not at fault and may have had valid claims.
^{FN12} Under these circumstances, absent a finding

of willfulness on Cruikshank's part and because lesser sanctions were not properly considered, dismissal of DelGuzzi's claims was an abuse of discretion.

FN12. The court stated to Cruikshank: I think that your client may have some ... valid concerns, and those concerns should be brought to the court's attention so that a decision can be made about whether the personal representative can be removed. And should be removed. But you, Mr. Cruikshank, have not complied with the court rules.

....

... That's your problem. It's not your client's problem.

2. CR 11 Sanctions

*8 In addition to dismissing DelGuzzi's claims as a discovery sanction, the trial court imposed attorney fees and costs against Cruikshank and DelGuzzi under CR 37(d) and CR 11. The trial court imposed a total of \$30,000, a portion of Wilbert's attorney fees and costs in defending the entire action. Cruikshank argues that the CR 11 sanctions were inappropriate and the \$30,000 figure was not reasonable. Because the sanctions imposed were a substantial amount of money, appellate review of the award should be inherently more rigorous to ensure that such sanctions are quantifiable with some precision. *MacDonald*, 80 Wash.App. at 892, 912 P.2d 1052 (citing *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 883 (5th Cir. 1988)).

CR 11 permits the court to order an attorney or party ^{FN13} to pay the other party's reasonable expenses incurred because of a filing deemed to violate CR 11. Here, the trial court based the sanctions upon both CR 11 and CR 37(d), without finding a specific violation of CR 11. The court merely stated: "I think it's appropriate to grant sanctions because this hearing wouldn't be required except

Not Reported in P.2d, 93 Wash.App. 1048, 1999 WL 10081 (Wash.App. Div. 2)
(Cite as: 1999 WL 10081 (Wash.App. Div. 2))

for the fact that there was failure to comply.”

FN13. DelGuzzi argues that the CR 11 sanctions against him are in error because sanctions against a party are only available under RCW 4.84.185. He cites *Havsy v. Flynn*, 88 Wash.App. 514, 945 P.2d 221 (1997), where the court stated: “Sanctions against an attorney are awarded under CR 11. Sanctions against a party are awarded under RCW 4.84.185.” *Havsy*, 88 Wn.App. at 521. *Havsy*, however, did not involve CR 11 sanctions. CR 11 clearly permits sanctions against “the person who signed [the offending pleading], a represented party, or both.” CR 11; see also *Blair v. GIM Corp.*, 88 Wash.App. 475, 481-82, 945 P.2d 1149 (1997); *Rhinehart v. Seattle Times Co.*, 51 Wash.App. 561, 581, 754 P.2d 1243 (citing *Wilson v. Henkle*, 45 Wash.App. 162, 174, 724 P.2d 1069 (1986)), review denied, 111 Wn.2d 1025 (1988), cert. denied, 490 U.S. 1015 (1989).

As discussed, before imposing CR 11 sanctions, the trial court must find both that a complaint lacks a factual or legal basis and that the attorney who signed and filed the complaint failed to conduct a reasonable inquiry into its factual and legal basis. *Bryant*, 119 Wash.2d at 220, 829 P.2d 1099. Also, the trial court must specify in the record the specific pleading that violates CR 11. *MacDonald*, 80 Wash.App. at 892, 912 P.2d 1052. Because the trial court neither identified a specific pleading nor examined its factual basis, CR 11 sanctions were not appropriate.

Monetary sanctions were, however, permissible under CR 37(d). That rule allows the court to impose the reasonable expenses caused by a party's failure to respond to discovery as a sanction, in addition to any other sanctions imposed. On remand, the trial court may impose as a discovery sanction Wilbert's reasonable expenses incurred as a result of DelGuzzi's failure to comply with discovery.

3. Sanctions Against Cruikshank

Cruikshank further contends that the trial court violated CR 54(f)(2)(B) and improperly imposed sanctions against him that were initially imposed only against DelGuzzi.

CR 54(f)(2)(b) requires that counsel be given five days' notice of presentation and served with a copy of any order or judgment prior to its entry. Cruikshank asserts that the trial court's order of January 17, 1997 granting Wilbert's motion was signed by the judge in his absence after the proceedings. He therefore claims that Wilbert's counsel had an improper ex parte contact with the trial court.

Wilbert counters that he served a copy of all orders on Cruikshank at least five days before the orders were entered. Cruikshank's assertion that the order was signed in his absence is not itself a violation of CR 54(f)(2), which merely requires that the parties be given five days' notice and served with a copy of the order.

*9 The January 17, 1997 order granting Wilbert's motion ordered attorney fees as a sanction against “Plaintiff Gary DelGuzzi.” The order was signed by the judge and Wilbert's counsel. The later order and judgment, dated April 8, 1997, imposed the sanction against both Cruikshank and DelGuzzi. The April 8th order stated that both counsel had participated in a teleconference hearing that set the sanction amount. In the April 8th order, the trial court found that judgment against both DelGuzzi and Cruikshank was appropriate.

These facts do not demonstrate a violation of CR 54(f)(2), or that adding Cruikshank to the judgment was improper. Cruikshank cites *Havsy v. Flynn*, 88 Wash.App. 514, 945 P.2d 221 (1997), arguing that the court may not include counsel for a party in a sanctions order when counsel was not named in the original order. The *Havsy* case, however, does not discuss sanctions against an attorney but only considers when RCW 4.84.185 sanctions are proper

Not Reported in P.2d, 93 Wash.App. 1048, 1999 WL 10081 (Wash.App. Div. 2)
(Cite as: 1999 WL 10081 (Wash.App. Div. 2))

against a party. *Havsy*, 88 Wash.App. at 521, 945 P.2d 221. Because Cruikshank fails to provide either authority or a factual basis to support his claims under CR 54(f)(2), his argument fails.

Fiduciary Conflict of Interest re Judgment in Favor of Wilbert

DelGuzzi, appealing pro se, contends it is an impermissible conflict of interest for Wilbert, as administrator, to pursue a judgment in an estate proceeding against the sole heir, and that it is improper for Wilbert to levy DelGuzzi's property to satisfy the judgment because Wilbert learned the location of DelGuzzi's property through his fiduciary relationship.

Although DelGuzzi is correct that a fiduciary has a duty to avoid conflicts of interest, it does not follow that Wilbert has violated that duty by defending his actions as administrator and seeking sanctions where appropriate. DelGuzzi's assertion that an administrator who breaches his fiduciary duty is not entitled to fees is likewise correct, but here no breach of fiduciary duty was ever proved. DelGuzzi's conflict of interest claims are otherwise unsupported and therefore fail.

In sum, the trial court did not abuse its discretion in awarding CR 11 sanctions to the Wilbert children. But the trial court abused its discretion in dismissing DelGuzzi's claims against Wilbert as a discovery sanction, and that dismissal is reversed. The \$30,000 sanction imposed under CR 11 and CR 37(d), following Wilbert's motion, was also an abuse of discretion. On remand, the trial court may impose, as a sanction under CR 37(d), the amount reasonably incurred by Wilbert as a result of DelGuzzi's failure to properly respond to discovery.

Affirmed in part, reversed in part and remanded for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

MORGAN and SEINFELD, JJ., concur.
Wash.App. Div. 2, 1999.

In re Estate of DelGuzzi
Not Reported in P.2d, 93 Wash.App. 1048, 1999 WL 10081 (Wash.App. Div. 2)

END OF DOCUMENT

Appendix 2(Delguzzi III)

1999 WL 1001082(Wn.App.
Div.2) August 31, 2001

Westlaw.

Page 1

Not Reported in P.3d, 108 Wash.App. 1003, 2001 WL 1001082 (Wash.App. Div. 2)
(Cite as: 2001 WL 1001082 (Wash.App. Div. 2))

M
NOTE: UNPUBLISHED OPINION, SEE RCWA
2.06.040

Court of Appeals of Washington, Division 2.
In re the Estate of Jack J. DELGUZZI, Deceased.
Gary DELGUZZI and Charles M. Cruikshank, III,
Appellants,

v.

William E. WILBERT, individually and as administrator of the Estate of Jack DelGuzzi; Loretta Dickson Wilbert, spouse of William E. Wilbert; William E. Wilbert-Broker, Inc., a Washington corporation; William E. Wilbert, P.S., Inc., a Washington corporation, Cedarwood Properties, Inc., a Washington corporation; W and S Investments, Inc., a Washington corporation; Hemisphere, Ltd., a Washington corporation; 400430 D.C. Ltd., a British Columbia, Canada corporation; 413505 T of G Holdings D.C., Ltd., a British Columbia, Canada corporation; William Dickson Wilbert, and Kathleen Ann Wilbert, husband and wife; Daniel Gerard Jarboe and Jane Doe Jarboe; Laure Anne Wilbert and John Doe Wilbert, husband and wife, Ellen D. Clark and Davis Wright Tremaine, Allen D. Clark and Jane Doe Clark; Davies, Wright and Tremaine, a Washington general partnership; Gary Parish and Susan Parish, husband and wife, William A. and Michel Shao Hai Carlsen, husband and wife; Gerald H. Shaw and Jane Doe Shaw, husband and wife; Paul R. Cressman and Short and Cressman, a Washington general partnership; Wilbert F. Hammond and Jane Doe Hammond, husband and wife; Lockwood Foundation; Western Surety Company, a company licensed to do business in the State of Washington, John Doe, I through John Doe XX and Jane Doe I through Jane Doe XXV; ABC Corporations I through XX; William W. Wilbert, Trustee of the Irrevocable Trust of Gary DelGuzzi; William E. Wilbert, as Trustee of the Trust of Loretta Dickson Wilbert; Western Surety Company; and Toth Wilbert & Hannon, an unknown entity; Sosumi, Inc., a

Washington corporation, Respondents.
No. 24860-3-II.

Aug. 31, 2001.

Appeal from Superior Court of Clallam County, Docket No. 80-8-7, judgment or order under review, date filed 06/18/1999; William E. Howard, Judge.

Charles M. Cruikshank III, Attorney At Law, Seattle, WA, for appellant(s).

Larry N. Johnson, Attorney At Law, Seattle, WA, for respondent(s).

UNPUBLISHED OPINION

HUNT.

*1 Gary DelGuzzi appeals (1) dismissal of his petitions for removal of his father's estate administrator, William Wilbert, and for damages; and (2) reimposition of discovery sanctions on remand from a previous appeal. As to the first claim, he argues that the trial court erred in dismissing on grounds of res judicata, collateral estoppel, and the law of the case doctrine. As to the second claim, he argues that the trial court failed to follow our remand instructions. We agree on both claims. The record does not show that the trial court evaluated DelGuzzi's discovery objections and responses to determine (1) whether he failed to comply with Wilbert's discovery requests; and (2) what reasonable expenses Wilbert incurred, if any, as a result of any failure to comply. Accordingly, we reverse the trial court's reimposition of monetary sanctions, and we reinstate DelGuzzi's action.

FACTS

I. the First Appeal

A. Precipitating Events

Not Reported in P.3d, 108 Wash.App. 1003, 2001 WL 1001082 (Wash.App. Div. 2)
(Cite as: 2001 WL 1001082 (Wash.App. Div. 2))

Jack DelGuzzi died in 1978, leaving his son and sole heir, Gary DelGuzzi (DelGuzzi) as personal representative of his estate. DelGuzzi served as representative until August 13, 1982, when he resigned in favor of the current Administrator, William Wilbert.

Under Wilbert's administration, DelGuzzi has received no distributions from the multi-million dollar estate. Wilbert, however, has billed the estate for 125% of its net value; of this billed amount, he has been paid fees and costs totaling about 90% of the net estate. Moreover, the estate's net assets have diminished from \$7.36 million in 1989 to less than the \$1.6 million Wilbert billed in 1997. Although the estate was ready to be closed at least by 1997, it still remains open.

In July 1996, DelGuzzi filed an amended complaint, (1) requesting removal of Wilbert as Administrator, requiring an accounting, appointing a successor, and granting other relief; and (2) alleging that Wilbert caused tort damages by breaching his fiduciary duty as Administrator, violating a court order requiring reporting and fee approval, using alter-ego corporations to conceal estate transactions, improperly using DelGuzzi's trust fund to pay estate debts, and failing to close the estate in a timely fashion. In October 1996, Wilbert filed his answer to DelGuzzi's petitions, adding affirmative allegations and defenses, including estoppel a day later.

The court set an evidentiary hearing on the removal petition for January 21-22, 1997.^{FN1} During fall 1996, the parties served interrogatories and requests for production on each other. DelGuzzi responded to Wilbert's interrogatories with a four-page list of objections.^{FN2} Wilbert filed a motion to compel responses to his interrogatories. DelGuzzi submitted 36 pages of answers and objections, providing some response to all 85 of Wilbert's interrogatories; many of DelGuzzi's responses did not provide the requested information. DelGuzzi asserted that he could not produce all requested information and documents because Wilbert had the information and Wilbert had failed to provide requested discovery to

DelGuzzi.

FN1. Wilbert later moved for a hearing on his Final Report and Petition for Decree of Distribution After Order of Solvency, Inventory of Appraisal of the assets of the Estate, and Comprehensive Accounting of the Estate. The court entered a stipulated order setting this hearing for the same dates as the previously set hearing on the removal petition.

FN2. It was this document-not the subsequent 36 page document of answers and objections-that Wilbert submitted to the trial court to support his original motion to dismiss DelGuzzi's claims as a discovery sanctions.

*2 Wilbert moved for sanctions under CR 11 ^{FN3} and CR 37(d), alleging that DelGuzzi had provided evasive and misleading discovery. DelGuzzi moved to compel discovery, claiming that Wilbert had failed to respond to interrogatories, had denied the existence of business records for many of the estate's corporate assets, and had failed to produce source documents (such as bank statements, check registers, deposit books, and cash journals) for estate reports and accountings. The hearing for both motions was set for January 17.

FN3. Wilbert also sought CR 11 sanctions. The CR 11 issue was decided in the previous appeal and is not before the court in this case.

At the January 17 hearing, the superior court ^{FN4} granted Wilbert's motion for discovery sanctions against both DelGuzzi and his lawyer, Charles Cruikshank. The court ruled that DelGuzzi's interrogatory answers were evasive, ^{FN5} ordered DelGuzzi to pay \$30,000 in attorney fees and costs to Wilbert,^{FN6} and dismissed DelGuzzi's claim under CR 37(d). The superior court so ruled based on DelGuzzi's initial four-page objection to Wilbert's interrogatories, which Wilbert had included with

Not Reported in P.3d, 108 Wash.App. 1003, 2001 WL 1001082 (Wash.App. Div. 2)
(Cite as: 2001 WL 1001082 (Wash.App. Div. 2))

his motion for sanctions. The superior court did not consider DelGuzzi's subsequent 36 pages of answers and objections. Nor did the court consider or rule on DelGuzzi's motion to compel discovery.

FN4. Judge William Howard.

FN5. As we noted in the first appeal, Wilbert gave the trial court the wrong set of responses to his interrogatories in 'exhibit H' attached to his memorandum supporting his motion for discovery sanctions. That attachment was not DelGuzzi's 36 pages of objections and responses from January 3, 1997, but rather DelGuzzi's four-page response.

FN6. The court based the monetary sanctions on both CR 11 and 37(d) without finding a specific violation of CR 11, noting simply, 'I think its appropriate to grant sanctions because this hearing wouldn't be required except for the ... failure to comply.'

On January 21, 1997, a different superior court judge ^{FN7} conducted an evidentiary hearing limited to Wilbert's final report and accounting for the estate. Neither that judge nor any other judge conducted a hearing on DelGuzzi's motion to compel discovery because the previous judge had dismissed DelGuzzi's action against Wilbert. Thus, DelGuzzi had no opportunity to compel the discovery that he claims was necessary to litigate his claim for wrongful administration of his father's estate.

FN7. Judge Leonard Costello.

B. Previous Appellate Court Decision

DelGuzzi appealed both discovery sanctions-dismissal of his lawsuit for wrongful estate administration and the attorney fee award to Wilbert. We reversed the discovery-sanction dismissal of DelGuzzi's claims against Wilbert. Opinion at 10-11, 13-16.^{FN8} We affirmed CR 11 sanctions against

DelGuzzi for his claims against Wilbert's children. But because the lower court had not specified what pleading, interrogatory answers, or objections had violated CR 11, we reversed the attorney fee sanctions arising from DelGuzzi's allegedly inadequate responses to Wilbert's discovery requests.

FN8. *In re the Estate of DelGuzzi*, No. 21752-0-II, 1999 WL 10081 (Wash.Ct.App., January 1999).

We also ruled, however, that monetary sanctions for failure to respond to discovery were theoretically permissible under CR 37(d). Accordingly, we held that on remand, the trial court could impose a CR 37(d) sanction for reasonable expenses that Wilbert incurred 'as a result of DelGuzzi's failure to respond properly to discovery.'

II. Remand Proceedings-Events Leading to Second Appeal

On remand, Wilbert asked the lower court to reinstate the attorney fee sanctions against DelGuzzi and Cruikshank under CR 37(d). The superior court ^{FN9} granted the request and reimposed the \$30,000 sanction, plus \$7,650 in interest. DelGuzzi again moved to compel discovery. But Wilbert urged the court to dismiss DelGuzzi's claim, this time based on *res judicata*, collateral estoppel, and law-of-the-case doctrine. Wilbert argued that, although DelGuzzi's wrongful estate administration claims had originally been dismissed as a discovery sanction, DelGuzzi was nevertheless barred from relitigating them on remand because the same issues had been decided in the probate hearing following the dismissal and before we heard the previous appeal.

FN9. Judge Howard.

*3 A different superior court judge ^{FN10} again dismissed DelGuzzi's claim, reasoning that at the January 21, 1997, hearing on Wilbert's final report and accounting for the estate, DelGuzzi had adequate opportunity to raise any and all claims and had lost. The superior court reasoned that at the

Not Reported in P.3d, 108 Wash.App. 1003, 2001 WL 1001082 (Wash.App. Div. 2)
(Cite as: 2001 WL 1001082 (Wash.App. Div. 2))

previous probate proceeding: (1) the superior court found Wilbert's Administrator fee reasonable; (2) this finding thereby necessarily included that the Administrator did not breach his fiduciary duty to the estate; and (3) this finding necessarily included DelGuzzi's claims of fraud/selfdealing and necessarily decided the claims in Wilbert's favor. The superior court did not address how DelGuzzi could have effectively mounted a challenge to the estate's administration without his discovery requests having been heard or granted. DelGuzzi amended his appeal to include this ruling and dismissal of his claims on remand.

FN10. Judge Leonard Costello.

ANALYSIS

I. Discovery Sanctions

A trial court has 'broad discretion' to impose sanctions for a party's failure to comply with discovery. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). We review discovery sanctions for abuse of discretion. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994) (citing *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338-39, 858 P.2d 1054 (1993)). A trial court abuses its discretion when its order is manifestly unreasonable or exercised on untenable grounds. *Fisons*, 122 Wn.2d at 339; *Burnet*, 131 Wn.2d at 494.

A. Re-imposition of \$30,000 Discovery Sanction on Remand

DelGuzzi first argues that the trial court erred in reinstating the monetary sanctions on remand because Wilbert failed to move to compel discovery, which is a procedural prerequisite to CR 37(b) or 37(d) remedies. We disagree. Although the plain language of CR 37(a) references 'an order compelling discovery,' '{a} motion to compel compliance with the rules is not a prerequisite to a sanctions motion.' *Fisons*, 122 Wn.2d at 345. Moreover, the re-

cord does not support DelGuzzi's claim that Wilbert never moved to compel. ^{FN11}

FN11. In our previous opinion, we noted that Wilbert moved to compel before the December 1996 negotiations between the parties.

DelGuzzi's second argument is that the trial court erred in reinstating the monetary sanctions absent a showing or finding that his allegedly misleading or evasive interrogatory responses prejudiced Wilbert. DelGuzzi acknowledges CR 37(d)'s provision that 'an evasive or misleading answer is to be treated as a failure to answer,' which allows sanctions for 'reasonable' expenses incurred by the other party, including attorney fees. Citing no authority, he argues that a party must be 'prejudiced' by the misleading or evasive answer before sanctions may be granted. Although prejudice is a prerequisite to dismissal as a discovery sanction,^{FN12} it is not a prerequisite to imposition of fees as a discovery sanction.^{FN13}

FN12. See, e.g. *Peterson v. Cuff*, 72 Wn.App. 596, 601-02, 865 P.2d 555 (1994) (citing *Snedigar v. Hoddersen*, 114 Wn.2d 153, 169-70, 786 P.2d 781 (1990)).

FN13. Furthermore, DelGuzzi's argument ignores that the opposing party incurs attorney fees and expenses in seeking to compel discovery and that these costs alone can constitute prejudice in the form of monetary harm.

DelGuzzi's third argument is that the attorney fee and costs award was unreasonable because Wilbert incurred them while seeking discovery sanctions rather than while seeking discovery itself. The trial court had evidence (primarily counsel's declarations and supporting exhibits) to support Wilbert's claim that he had incurred over \$30,000 in expenses in attempting to obtain discovery, not sanctions, from DelGuzzi. Based on these facts, the award was not an abuse of discretion.

Not Reported in P.3d, 108 Wash.App. 1003, 2001 WL 1001082 (Wash.App. Div. 2)
(Cite as: 2001 WL 1001082 (Wash.App. Div. 2))

*4 Nonetheless, DelGuzzi's final argument is more compelling:

The trial court's reinstatement of the monetary discovery sanctions on remand ignored our previously stated concerns about factual errors and circumvention of due process in the trial court's original award of sanctions, the subject of the previous appeal. Again, we acknowledge that the plain language of CR 37(d) gives a trial court broad discretion to impose costs as a sanction for evasive answers. In our previous opinion, we highlighted significant due process deficiencies underlying the original imposition of sanctions. Yet, the trial court did not address or remediate these deficiencies before reinstating the monetary discovery sanctions on remand.

We resolve the due process concerns by looking to the record and the law. The requirements that there be a finding of 'willfulness' and 'prejudice,' that the trial court consider lesser sanctions, and that the trial court consider the party's reasonable excuses apply only as to whether dismissal of a claim is an appropriate discovery sanction. The case law does not similarly apply these requirements to the appropriateness of monetary discovery sanctions.^{FN14} DelGuzzi's reliance on our previous ruling, that a substantial monetary sanction requires a more rigorous review,^{FN15} is misplaced: In our previous opinion we discussed sanctions under CR 11, not CR 37, the focus of the trial court's order on remand and the instant appeal.

FN14. See, e.g., *Peterson*, 72 Wn.App. at 601-02 (discussing necessity of finding willfulness and prejudice for dismissal purposes); accord *Snedigar*, 114 Wn.2d at 170. These cases do not discuss monetary sanctions.

FN15. Reply Br. of Appellant at 5 (citing *MacDonald v. Korum Ford*, 80 Wn.App. 877, 892, 912 P.2d 1052 (1996) (citation omitted)).

But the factual errors are more egregious. In the first appeal, we noted that in ruling on Wilbert's discovery motions, the trial court considered the wrong documents-Wilbert gave the trial court the wrong set of DelGuzzi's responses to interrogatories. Thus, before dismissing DelGuzzi's action, the previous trial court considered only his initial four-page objection to Wilbert's interrogatories, not DelGuzzi's later 36 pages of objections and substantive responses. Opinion at 12. And on remand, the trial court did not address our factual concerns. Nor did its order on remand indicate that the court had considered the correct interrogatory responses before reimposing the monetary sanctions.

Failure to consider DelGuzzi's actual answers and objections deprived the court of the only available means for determining whether DelGuzzi and Cruikshank complied as fully as possible with Wilbert's interrogatories. If they did comply as fully as possible, then their responses were not misleading or evasive and, thus, did not warrant sanctions. In our remand order, we authorized discretionary imposition of a discovery sanction only for expenses 'incurred as a result of DelGuzzi's failure to comply with discovery.' Opinion at 17 (emphasis added). We cannot tell from the record that the trial court on remand followed this directive in considering or determining whether DelGuzzi's answers and objections to the interrogatories were inappropriate or a 'failure to comply with discovery.' Absent such determination, and in light of the trial court's apparently summary reimposition of the very monetary sanctions that we had just vacated, the trial court's monetary sanctions on remand were an abuse of discretion.

B. Interest

*5 Since we again reverse the monetary sanctions, we also reverse the interest award. Nonetheless, we address whether the trial court had authority to award interest because it may arise again if the trial court again imposes discovery sanctions on remand after proper consideration of DelGuzzi's responses

Not Reported in P.3d, 108 Wash.App. 1003, 2001 WL 1001082 (Wash.App. Div. 2)
(Cite as: 2001 WL 1001082 (Wash.App. Div. 2))

to Wilbert's interrogatories.

On remand from the first appeal, Wilbert requested and obtained an award of post-judgment interest on his judgment for monetary damages to run from the first entry of judgment awarding sanctions in April 1997.

DelGuzzi contends that the award of interest was in error. He first argues that because 'the amount was not liquidated, there is no basis for prejudgment interest.' Br. of Appellant at 33. But this argument misapprehends the nature of the interest award here. The interest runs from the date of the original judgment and is therefore post-judgment interest. Thus, DelGuzzi's first argument lacks merit.

But DelGuzzi's argument relying on case law and the statute rests on firmer footing. It is well settled that where the appellate court on remand leaves the trial court with 'a mere mathematical problem, ... interest {runs} from the date of the original judgment.' *Yarno v. Hedlund Box & Lumber Co.*, 135 Wash. 406, 408-09, 237 P. 1002 (1925). DelGuzzi correctly asserts that such is not the case here, analogizing to *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 798 P.2d 799 (1990). There, because the appellate court required the trial court to consider two alternative measures of damages on remand, our Supreme Court ruled that the remand required new findings and a new judgment. *Fisher Properties*, 115 Wn.2d at 373-74. Here, we required the trial court to make a new factual finding based on the correct document (DelGuzzi's actual answers and objections to Wilbert's interrogatories); as in *Fisher*, we effectively required entry of a new judgment.

Our analysis is consistent with the plain language of the statute prescribing interest on judgments, RCW 4.56.110, which provides that, generally 'judgments shall bear interest from the date of entry ... thereof.' The statute further provides in any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on

review, interest on the judgment or on that portion ... affirmed shall date back to and shall accrue from the date the verdict was rendered.

RCW 4.56.110.

The second quoted passage does not apply here because we did not simply direct the trial court to enter judgment on a verdict or a partly affirmed portion of a verdict. Thus, under the statute, there can be no imposition of interest dating back to the first trial court's original award of monetary sanctions, which we previously reversed. Rather, we remanded for reconsideration in light of the first trial court's original factual mistakes, thereby requiring entry of a new judgment. Accordingly, if on the instant remand the trial court considers the correct document containing DelGuzzi's answers to Wilbert's interrogatories, and if it again imposes monetary sanctions, interest would begin to run from the date of entry of that new judgment.

II. Dismissal of DelGuzzi's Claims

*6 The trial court dismissed DelGuzzi's claims on grounds of res judicata and collateral estoppel. These are issues of law, which we review de novo. *Mountain Park Homeowner's Ass'n Inc. v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). See also *Kuhlman v. Thomas*, 78 Wn.App. 115, 120, 897 P.2d 365 (1995) (appellate review of proper application of res judicata is question of law); *State v. Bryant*, 100 Wn.App. 232, 236-37, n. 9, 996 P.2d 646 (2000) (appellate review of proper application of collateral estoppel is reviewed de novo).

It is appropriate to consider our previous unpublished decision ^{FN16} in examining the issues of law of the case, res judicata or collateral estoppel. *State v. Sanchez*, 74 Wn.App. 763, 765 n. 1, 875 P.2d 712 (1994). The instant appeal involves the same case, the same parties, and some of the same issues as the first appeal. Wilbert has raised both res judicata and collateral estoppel issues. Both parties have invoked the law of the case doctrine.

Not Reported in P.3d, 108 Wash.App. 1003, 2001 WL 1001082 (Wash.App. Div. 2)
(Cite as: 2001 WL 1001082 (Wash.App. Div. 2))

FN16. We may also use our prior unpublished opinion as evidence of the facts established in earlier proceedings in the same case or in a different case involving the same parties. *Island County v. Mackie*, 36 Wn.App. 385, 391 n. 3, 675 P.2d 607 (1984).

A. Due Process

When we remanded this case in 1999, our core concerns were the trial court's failure to make any finding of willfulness on the part of DelGuzzi and his attorney or prejudice to Wilbert, and its failure to consider lesser sanctions short of dismissing DelGuzzi's action. We noted in our previous opinion that such failure runs afoul of constitutional due process limits. Opinion at 13 (citing *Peterson v. Cuff*, 72 Wn.App. 596, 601-02, 865 P.2d 555 (1994)).

Yet on remand, the trial court not only failed to enter findings that DelGuzzi willfully evaded Wilbert's discovery requests or that DelGuzzi's objections and partial responses prejudiced Wilbert, it did not even address those issues. Likewise, it did not consider lesser sanctions short of dismissing DelGuzzi's action outright. Then, upon Wilbert's motion, the court postponed a hearing on DelGuzzi's renewed motion to compel discovery and relied entirely on res judicata and collateral estoppel as grounds for dismissing his claims. Unless those doctrines apply, the trial court abused its discretion and committed an error of law by failing to address the due process concerns we raised in our previous decision. As we noted in our opinion on the first appeal, to satisfy due process, the trial court had to establish on the record that there was 'willfulness' by DelGuzzi and 'prejudice' to Wilbert before dismissing DelGuzzi's claims. Opinion at 13 (citing *Peterson*, 72 Wn.App. at 559, 601-02) (emphasis added) The trial court was also first required to consider whether less severe sanctions would suffice. *RCL Northwest, Inc. v. Colorado Resources, Inc.*, 72 Wn.App. 265, 271-72, 864 P.2d 12

(1993) (quoting *Shedigar v. Hoddersen*, 114 Wn.2d 153, 170, 786 P.2d 781 (1990)). Thus, because the trial court failed to make such a record, unless DelGuzzi's claims are barred by claim or issue preclusion or the law of the case doctrine, dismissal was erroneous.

B. Res Judicata

*7 Wilbert contends that res judicata bars DelGuzzi's claims because DelGuzzi had a chance to litigate fully those claims in the Final Accounting hearing of January 21, 1997. The record is to the contrary. Because another judge had dismissed DelGuzzi's wrongful-estate administration claims as a sanction for discovery violations, the trial court limited the January 21 hearing to Wilbert's final accounting of the estate. DelGuzzi neither presented nor had an opportunity to present his claims at that hearing.

First, as DelGuzzi correctly notes, Wilbert has not preserved his res judicata claim. CR 8(c) requires a party affirmatively to plead res judicata, which Wilbert failed to do.^{FN17} See also, *Bruce v. Foley*, 18 Wash. 96, 50 P. 935 (1897); *Mahoney v. Tingley*, 85 Wn.2d 95, 100, 529 P.2d 1068 (1975). Nor have the parties waived compliance with this mandatory provision of CR 8(c). Thus, we need not address this issue on appeal. *Federal Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 433-35, 886 P.2d 172 (1994).

FN17. Wilbert admits that this defense did not arise until we reversed the discovery sanction of dismissal in the prior appeal. He asserts, however, that he may now raise the defense on remand from that ruling. He cites no case law to support this argument.

Nonetheless, in order to avoid its possible application on remand, we briefly address the substance of Wilbert's res judicata claim. We extensively discussed the applicability of res judicata in *Kelly-Hansen v. Kelly-Hansen*, 87 Wn.App. 320, 941

Not Reported in P.3d, 108 Wash.App. 1003, 2001 WL 1001082 (Wash.App. Div. 2)
(Cite as: 2001 WL 1001082 (Wash.App. Div. 2))

P.2d 1108 (1997):

{R}es judicata {as claim preclusion} encompasses the idea that when the parties to two successive proceedings are the same, and the prior proceeding culminated in a final judgment, a matter may not be relitigated, or even litigated for the first time, if it could have been raised, and in the exercise of reasonable diligence should have been raised, in the prior proceeding.

Kelly-Hansen, 87 Wn.App. at 328-29 (footnotes omitted) (emphasis added). We concluded:

In general, one cannot say that a matter should have been litigated earlier if, for some reason, it could not have been litigated earlier; thus, res judicata will not operate ... if evidence needed to establish a necessary fact would not have been admissible in the prior proceeding. Similarly, one cannot say that a matter should have been litigated earlier if, even though it could have been litigated earlier, there were valid reasons for not asserting it earlier.

Kelley-Hansen, 87 Wn.App. at 330-31 (citations omitted) (emphasis added). Such is the case here.

First, because the previous judge had dismissed his claims, DelGuzzi no longer had any matters before the court to litigate.

Second, although at the Final Accounting hearing, DelGuzzi could have alleged that Wilbert had breached his fiduciary duties, DelGuzzi had no evidence to support such allegations; the previous judge had failed to entertain his motion to compel Wilbert to provide such discovery and instead found DelGuzzi to have been the party failing to comply with discovery. At this point it was arguably futile to renew his motion to compel.

Third, because he could not compel discovery and because he no longer had an active claim, DelGuzzi could not have offered crucial evidence in the previous proceeding to establish the necessary facts underlying his dismissed claims. ^{FN18} Res judicata

does not now preclude DelGuzzi's raising the issues of wrongful dismissal of his claim and implicit denial of his discovery motion.

FN18. Had he been able to obtain the necessary discovery from Wilbert, DelGuzzi could have used any evidence gleaned therefrom in the Accounting and Fee Petition hearing. Indeed, the trial court below noted that allowing DelGuzzi's tort claim to proceed would require reopening the estate for a second accounting of the Administrator's acts, which the trial court was unwilling to undertake.

C. Collateral Estoppel

*8 Wilbert also contends that collateral estoppel bars DelGuzzi's claims. The doctrine of collateral estoppel, also called issue preclusion, prevents re-litigation of an issue by a party against whom the bar is sought if that party had a full and fair opportunity to litigate that issue in a prior proceeding. *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262, 956 P.2d 312 (1998). The party asserting collateral estoppel bears the burden of proof. *Nielson*, 135 Wn.2d at 263.

The party asserting collateral estoppel must prove four elements: (1) The issue decided in the prior adjudication was identical with the one presented in the second; (2) the prior adjudication ended in a final judgment on the merits; (3) the party against whom the doctrine is asserted was a party or in privity with a party to the prior action; and (4) application of the doctrine will not work an injustice on the party against whom it is to apply. *Nielson*, 135 Wn.2d at 263. All four elements must be satisfied in order for collateral estoppel to apply. DelGuzzi directly challenges the application of elements (1), (2) and (4). We agree that elements (1) and (4) are lacking.

For the reasons we mention in our discussion of res judicata, supra, the issue before us on appeal is not

Not Reported in P.3d, 108 Wash.App. 1003, 2001 WL 1001082 (Wash.App. Div. 2)
(Cite as: 2001 WL 1001082 (Wash.App. Div. 2))

the same as the issue decided at the January 21, 1997, hearing. Again, that hearing focused on the estate administrator's petition for approval of his fees and plan of distribution. It did not resolve DelGuzzi's tort claims and related issues because the previous judge had dismissed DelGuzzi's action and had not granted his motion to compel Wilbert to produce necessary documents.^{FN19} Consequently, the issues involved in DelGuzzi's claims were not necessarily determined at the estate accounting hearing.

FN19. Moreover, DelGuzzi had already appealed the dismissal of his action and denial of discovery, but the appeal had not yet been resolved.

As to the fourth element, it would work an injustice to apply collateral estoppel to preclude resolution of DelGuzzi's claims. First, the trial court wrongfully dismissed his claims, in part because it had the wrong documents before it. Second, Wilbert's failure to return to DelGuzzi key source documents from DelGuzzi's original administration of the estate ^{FN20} limited his ability to participate fully in the estate accounting hearings and to challenge the accuracy of Wilbert's accounting. Without these documents, DelGuzzi could not effectively impeach or rebut testimony at the hearing that the estate's loss of millions of dollars was not attributable to Wilbert, even though some evidence could have cast doubt on Wilbert's estate administration.^{FN21} Application of collateral estoppel here would be manifestly unjust.

FN20. DelGuzzi asserts that Wilbert produced only about half the amount of documents he had turned over to Wilbert some fifteen years earlier and that the documents Wilbert did produce were irrelevant and immaterial. Reply Br. of Appellant at 15-16.

FN21. For example, Wilbert's accountant testified that Wilbert's fees and costs totaled about 90% of the net estate and that

Wilbert had billed the estate for 125% of its net value. The net assets of the estate had apparently diminished from \$7.36 million in 1989 to less than the \$1.6 million Wilbert had billed in 1997. There was some indication the estate could have been closed as early as 1984. The trial court concluded, in 1997, that the estate was ready to be closed. Still, it is not closed. Rather, this probate proceeding has been open for more than 18 years. And DelGuzzi, his father's sole heir, asserts that he has never received a distribution from the estate during Wilbert's administration.

As with *res judicata*, collateral estoppel does not apply to bar resolution of DelGuzzi's claims.

D. Law of the Case

Finally, Wilbert argues that the law of the case doctrine bars DelGuzzi from now challenging the court's imposition of discovery sanctions and dismissal of his claims. He cites no case law in support. Wilbert contends that in our previous opinion, we held that monetary sanctions for discovery violations under CR 37(d) were required and that became the law of the case in this matter. Br. of Resp't at 19. He is wrong.

*9 First, he misconstrues our prior ruling. We did not hold that CR 37(d) sanctions were mandatory. Rather, we ruled that they were available, contingent on the trial court on remand redressing its previous error in ignoring DelGuzzi's answers and objections to Wilbert's interrogatories. Second, Wilbert's argument contravenes RAP 2.5(c)(2), which restricts the law of the case doctrine and allows us to 'review the propriety of an earlier decision ... in the same case and, where justice {requires}, decide the case on the basis of {its} opinion of the law at the time of the later review.' Under this rule, we may rectify any misunderstanding Wilbert may have as to the nature of our prior ruling in this case. Moreover, under this rule we also address the ap-

Not Reported in P.3d, 108 Wash.App. 1003, 2001 WL 1001082 (Wash.App. Div. 2)
(Cite as: 2001 WL 1001082 (Wash.App. Div. 2))

parent misapprehension of our remand order requiring the trial court to show on the record its consideration of the appropriate document(s) before considering whether to reimpose sanctions against DelGuzzi.

RAP 2.5(c)(2) requires that justice be done. Thus, we again address both the trial court's mistakes and DelGuzzi's due process rights. We hold that the law of the case doctrine does not apply here to bar DelGuzzi's appeal from dismissal of his claims.

CONCLUSION

The trial court's stated reasons do not support dismissal of DelGuzzi's claims. The trial court failed to follow our directive on remand to consider the substance of Wilbert's discovery requests and the substance of DelGuzzi's responses and objections, including his claim that he was unable to respond because Wilbert possessed critical documents that DelGuzzi had earlier turned over to Wilbert and which Wilbert refused to return to DelGuzzi. Therefore, both dismissal of DelGuzzi's wrongful estate administration action and reimposition of \$30,000 in discovery sanctions against DelGuzzi, plus interest, were error.

On remand, the trial court should consider (1) DelGuzzi's motion to compel discovery, (2) DelGuzzi's 36 page response to Wilbert's interrogatories and any other evidence pertinent to DelGuzzi's claim of inability to respond,^{FN22} and (3) only then reconsider Wilbert's motion for discovery sanctions if still potentially pertinent.

FN22. The trial court should make clear on the record what documents it has considered and the basis for its ruling.

Reversed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

ARMSTRONG, C.J., and QUINN-BRINTNALL,
J., concur.
Wash.App. Div. 2, 2001.
Delguzzi v. Wilbert
Not Reported in P.3d, 108 Wash.App. 1003, 2001
WL 1001082 (Wash.App. Div. 2)

END OF DOCUMENT

Appendix 3 (Delguzzi IV)

2009 WL 1863892 (Wn.App.
Div.2) June 30, 2009

Westlaw.

Page 1

Not Reported in P.3d, 2009 WL 1863892 (Wash.App. Div. 2)
 (Cite as: 2009 WL 1863892 (Wash.App. Div. 2))

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 Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE RCWA
 2.06.040

Court of Appeals of Washington,
 Division 2.
 In re the ESTATE OF Jack DeIGUZZI, Deceased.
 No. 36682-7-II.

June 30, 2009.

West KeySummary
 Executors and Administrators 162  71

162 Executors and Administrators
 162III Assets of Estate
 162III(B) Appraisal and Inventory
 162k71 k. Additional or Supplemental In-
 ventory. Most Cited Cases

A trial court did not abuse its discretion in not ordering a court-appointed estate administrator to prepare additional formal inventories and appraisements, in an action challenging the closing of an estate. The estate administrator sent a letter to the former personal representative of the estate, in which she stated that she did not believe a new inventory was needed and explained that the only remaining property in the estate was a parcel of land that all parties knew about and that had a pending purchase offer. The former personal representative could not identify the harm the estate administrator caused by her alleged failure to further inventory and appraise unnamed properties. Moreover, the estate administrator's letter set out reasonable grounds for her decision not to prepare a new inventory and appraisal. RCW 11.44.050.

Appeal from Clallam Superior Court; Honorable Leonard Costello, J.
 Charles Malcolm Cruikshank III, Attorney at Law, Seattle, WA, for Appellant.

Kathryn A. Ellis, Attorney at Law, Seattle, WA, G. Michael. Zeno Jr., Zeno Drake Bakalian PS, Kirkland, WA, for Respondent.

Guy Paul Michelson, Emily J. Brubaker, Molly Aneesa Malouf, Corr Cronin Michelson Baumgardner & Pree, Seann C. Colgan, Attorney at Law, Seattle, WA, Amicus Curiae on behalf of Short Cressman & Burgress PLLC.

UNPUBLISHED OPINION

HOUGHTON, J.

*1 In this third appeal related to the administration of the estate of Jack DeIGuzzi (Estate), who died in 1978, Sidney Shaw, the personal representative of the estate of Gary DeIGuzzi, Jack DeIGuzzi's late son, claims that everyone who has administered the Estate has harmed it. He argues that the trial court erred in closing the Estate and in entering an order changing venue without consolidating two lawsuits. We affirm the trial court's 2007 order to close the Estate and dismiss the remaining issues presented for review as untimely.

FACTS

A. Gary DeIGuzzi's Complaint

When Jack DeIGuzzi died in 1978, his will appointed his son, Gary DeIGuzzi, ^{FNI} personal representative of his Estate. Gary served as personal representative until August 13, 1982, when he resigned and William took over. In 1994, Gary sued William in Clallam County Superior Court. The complaint alleged that William, who was a real estate agent and developer, breached his fiduciary duty, engaged in self-dealing, and failed to account for Estate assets. Gary sought an accounting and the return of any improper fees, charges, and distribu-

Not Reported in P.3d, 2009 WL 1863892 (Wash.App. Div. 2)
(Cite as: 2009 WL 1863892 (Wash.App. Div. 2))

tions. Gary amended his complaint several times, but the matter never went to trial.

FN1. Both Jack and Gary DelGuzzi have now died. To avoid confusion because there are now two DelGuzzi estates, we use Gary's first name. The same use of a first name applies for William Wilbert, a former administrator of the Estate; Loretta Wilbert, the current representative of William's estate; Margaret Shaw, a past personal representative of Gary's estate; and Sidney Shaw, the current personal representative of Gary's estate and an appellant.

Gary died in 2004. Margaret served briefly as Gary's estate's personal representative but died in August 2004. Her husband, Sidney, then replaced her.

William died in 2004. Loretta Wilbert serves as William's personal representative. Loretta is a respondent.

After William's death, David Martin served briefly as the Estate's administrator. Retired Judge Gary Velie replaced Martin for a short time, starting in October 2004. The trial court appointed Kathryn Ellis, a respondent, on January 13, 2005.

Gary's second amended complaint, dated September 14, 1994, named additional defendants, including William's children. This complaint sought orders to void transfers of Estate assets to William, his family members, and their related corporate entities, and to remove William as personal representative. All of his children performed services for the Estate and received compensation for their work. These services included real property sales, property development, property management, appraisal work, and clerical and administrative services. In addition to cash payments for commissions and fees, at least one of the children received two parcels of real property from the Estate as compensation.

Gary filed another amended complaint on July 16, 1996 (July 1996 complaint). It separated his causes of action. One cause (damages petition) alleged tort claims against William for (1) various breaches of fiduciary duty, (2) violation of a court order requiring reporting and approval of administrative fees, (3) using sham corporations to conceal Estate transactions, (4) improperly borrowing separate trust fund assets to pay Estate liabilities, and (5) failing to close the Estate in a timely manner.^{FN2} In his damages petition, Gary requested an order setting a trial date on damages, but no date was set. The other cause of action (removal petition) requested orders removing William, requiring him to render an accounting, appointing a successor administrator, and for other related relief. The trial court set an evidentiary hearing on the motion to remove William for January 21, 1997.^{FN3}

FN2. We describe the July 1996 complaint based on *DelGuzzi v. Wilbert*, noted at 108 Wash.App. 1003, 2001 WL 1001082. No party attached the July 1996 petition and complaint to briefing, nor did any party provide an accurate record citation for this document.

We note that an unpublished opinion may be used as evidence of the facts established in earlier proceedings in the same case or in a different case involving the same parties. *Island County v. Mackie*, 36 Wash.App. 385, 391 n. 3, 675 P.2d 607 (1984). Unpublished cases can also be cited to establish facts in a different case that are relevant to the current case involving the same parties. *In re Pers. Restraint of Davis*, 95 Wash.App. 917, 920 n. 2, 977 P.2d 630 (1999), *aff'd*, 142 Wash.2d 165, 12 P.3d 603 (2000).

Loretta provided an additional complaint against her as Appendix 10 to her brief. She states, "The allegations in th[is] suit are similar to those in the July 1996 Peti-

Not Reported in P.3d, 2009 WL 1863892 (Wash.App. Div. 2)
(Cite as: 2009 WL 1863892 (Wash.App. Div. 2))

tion." Loretta Br. at 12. The allegations included that William (1) engaged in improper self dealing with the Estate; (2) abused his fiduciary relationship; (3) acted only to benefit him, his family, and his own businesses; (4) used assets from the Estate to fund business ventures in Costa Rica and Panama and shielded information and accounting related to these venture from Estate beneficiaries; (5) never provided an accurate inventory and accounting of the Estate; (6) wrongfully disposed of assets at less than fair market value; and (7) improperly retained real estate commissions.

FN3. William later moved for a hearing on his final report and petition for decree of distribution after filing an order of solvency, inventory of appraisal of the Estate assets, and comprehensive accounting of the Estate. The trial court entered a stipulated order setting this hearing for the same dates as the previously set hearing on the removal petition. After conducting hearings, the trial court entered a decision, which we discuss in more detail in this opinion.

During fall 1996, the parties served interrogatories and requests for production on each other. Gary responded to William's interrogatories with a four-page list of objections. William moved to compel responses to his interrogatories. Gary submitted 36 pages of answers and objections, providing some response to all of William's 85 interrogatories; many of Gary's responses did not provide the requested information. Gary asserted that he could not produce all the requested information and documents because William had the information and William had failed to provide Gary's requested discovery.

*2 William moved for sanctions under CR 11 and CR 37(d), claiming that Gary had provided evasive and misleading discovery. Gary moved to compel

discovery, claiming that William had failed to respond to interrogatories, had denied the existence of business records for many of the Estate's corporate assets, and had failed to produce source documents (such as bank statements, check registers, deposit books, and cash journals) for Estate reports and accountings. The trial court set both motions for hearing on January 17, 1997.

At the January 17, 1997 hearing, the trial court granted William's motion for discovery sanctions against both Gary and his attorney, Charles Cruikshank. The trial court found Gary's interrogatory answers evasive, ordered Gary and Cruikshank to pay \$30,000 in attorney fees and costs to William, and dismissed Gary's claims as a CR 37(d) sanction. The trial court based its ruling on Gary's initial four-page objection to William's interrogatories, which William had included with his sanctions motion. The trial court did not consider Gary's later-produced 36 pages of answers and objections. Nor did it consider or rule on Gary's motion to compel discovery.

B. Estate Administration

On January 21, 1997, a different trial court than the one overseeing the July 1996 complaint litigation conducted an evidentiary hearing limited to William's final report ^{FN4} and accounting for the Estate. Neither that judge nor any other judge conducted a hearing on Gary's motion to compel discovery because the previous judge had dismissed Gary's July 1996 complaint against William under CR 37(d). The trial court entered a memorandum decision on the final report on October 16, 1997. This order stated that "[i]t appears to this Court, having heard the testimony and reviewed the documents ... that this Estate is ready to be settled and closed." Clerk's Papers (CP) at 1967. The trial court asked the parties to draft an agreed distribution plan. The parties did not reach agreement, so on June 5, 1998, the trial court entered an order to close the Estate, to set up a distribution plan, and to set up a plan to handle expenses (1998 closing plan).

Not Reported in P.3d, 2009 WL 1863892 (Wash.App. Div. 2)
(Cite as: 2009 WL 1863892 (Wash.App. Div. 2))

FN4. The trial court held hearings on the final report on January 21-23 and March 24-25, 1997.

C. First Appeal and Remand

Gary appealed both the discovery-sanction dismissal of his July 1996 lawsuit for wrongful Estate administration and William's attorney fee award. We reversed the discovery-sanction dismissal of Gary's claims against William and Cruikshank. We affirmed CR 11 sanctions against Gary for his claims against William's children. Nevertheless, because the lower court had not specified what pleading, interrogatory answers, or objections had violated CR 11, we reversed the attorney fee sanction arising from Gary's inadequate responses to William's discovery requests. *In re Estate of DelGuzzi*, noted at 93 Wash.App. 1048, 1999 WL 10081 (*DelGuzzi I*).

We also held, however, that CR 37(d) permits monetary sanctions for failure to respond to discovery. Accordingly, we noted that on remand, the trial court could impose a CR 37(d) sanction for reasonable expenses that William incurred "as a result of [Gary's] failure to respond properly to discovery." *DelGuzzi I*, 93 Wash.App. 1048, 1999 WL 10081 at *9.

*3 On remand, William asked the trial court to reinstate the attorney fee sanctions against Gary and Cruikshank under CR 37(d). The trial court granted the request and re-imposed a \$30,000 sanction, plus \$7,650 in interest. Gary again moved to compel discovery. William urged the trial court to dismiss Gary's claim, this time based on res judicata, collateral estoppel, and law-of-the-case doctrine. William argued that, although Gary's wrongful Estate administration claims had originally been dismissed as a discovery sanction, Gary was nevertheless barred from relitigating them on remand because the same issues had been decided in the probate hearings leading up to the trial court's issuance of the 1998 closing plan.

A different superior court judge again dismissed Gary's claim, reasoning that at the 1997 hearings on William's final report and accounting for the Estate, Gary had adequate opportunity to raise all claims and he did not prevail. The trial court reasoned that at the previous probate proceeding the superior court found William's administration fees reasonable and that the personal representative did not breach his fiduciary duty to the Estate (including fraud and self-dealing claims). The trial court did not address how Gary could have effectively mounted a challenge to the Estate's administration without the fulfillment of his discovery requests.

D. Second Appeal and Remand

Gary appealed the dismissal of his July 1996 petitions for William's removal as the personal representative and for damages and the imposition of discovery sanctions on remand from the first appeal. As to the petitions, he argued that the trial court erred in dismissing them on grounds of res judicata, collateral estoppel, and the law-of-the-case doctrine. As to the sanctions claim, he argued that the trial court failed to follow our remand instructions.

In the second appeal, we agreed with Gary on both claims because the record did not show that the trial court evaluated Gary's discovery objections and responses to determine whether he failed to comply with William's discovery requests and what reasonable expenses William incurred, if any, as a result of any failure to comply. Accordingly, we reversed the trial court's re-imposition of monetary sanctions and remanded for further action on Gary's petitions. *DelGuzzi v. Wilbert*, noted at 108 Wash.App. 1003, 2001 WL 1001082 (*DelGuzzi II*).

E. Present Appeal

The trial court appointed bankruptcy trustee, Kathryn Ellis, as the Estate administrator on January 13, 2005. The order appointing Ellis directed her to liquidate any remaining Estate real estate parcels and to submit an updated accounting. The order also

Not Reported in P.3d, 2009 WL 1863892 (Wash.App. Div. 2)
(Cite as: 2009 WL 1863892 (Wash.App. Div. 2))

prohibited her from pursuing claims against William (now his estate). Acting according to these limited duties, Ellis liquidated the remaining properties and distributed the proceeds. No one objected to the sales. She obtained an order to close the Estate on July 27, 2007 (2007 closing order).

*4 After Gary's and William's deaths, Gary's attorney, Cruikshank, moved to substitute their estates' personal representatives as parties in the pending case stemming from the July 1996 complaint. The trial court granted the motion. Between 2004 and 2007, Cruikshank filed motions and discovery requests. As of the time the court entered the 2007 closing order in the Estate in July 2007, however, the claims in the July 1996 complaint had not been resolved.

In August 2004, Cruikshank filed a notice of creditor's claim in William's King County probate. Loretta rejected the claim in 2006. Sidney filed suit in Clallam County in December 2006 (2006 case). According to both Loretta and Cruikshank, the claims in this matter resemble the claims in the July 1996 case.^{FN5}

FN5. We agree with Ellis that the claims raised in the removal petition are moot due to William's death; only the damages petition remains potentially viable. See footnotes 2 and 19, herein, for further discussion.

Loretta moved to change venue in the 2006 Clallam County case to King County. Cruikshank moved to consolidate the 1996 case with the 2006 case. In late 2007, Loretta obtained a change of venue of the 2006 case to King County; the venue order does not discuss consolidation.^{FN6}

FN6. In April 2008, Martin moved to amend the 2006 complaint, substituting himself for Sidney based on Martin's having purchased the claims from Sidney. At the time of argument, this motion remained pending.

Sidney appealed, arguing that the trial court erred in entering its 2007 closing order. By an amended notice of appeal, he further argues that the trial court erred in ordering a change of venue without consolidating the two cases.

ANALYSIS

Timeliness of Appeal

A. The 1998 Closing Plan

As a preliminary matter, Ellis, the court-appointed administrator, argues that the 1998 closing plan approved by the trial court was a final order and cannot be appealed at this late date.^{FN7} Due to the unique procedural history of this matter, we disagree that the order was final at the time it was entered but agree that it is no longer appealable due to the entry of subsequent final and appealable interim distribution orders.

FN7. RAP 5.2(a) requires an appeal be filed within 30 days of the entry of the trial court's order.

On December 17, 1996, William filed a final report and petition for decree of distribution under RCW 11.76.030, which sets out the procedure for court approval of a final report and petition for distribution. After taking evidence on the petition, the trial court issued a decision that the Estate was ready to be closed and asking the parties to reach an agreement on distribution. The decision addressed challenges to the Estate's administration. For example, it specifically limited one of William's administration fee claims for real estate commissions to no more than \$130/hour and disallowed expenses related to transactions and property in Costa Rica because William "breach[ed] his duty to the Estate as administrator in that he put himself in a situation where his self-interest could potentially conflict with the Estate." CP at 1970. The parties did not

Not Reported in P.3d, 2009 WL 1863892 (Wash.App. Div. 2)
(Cite as: 2009 WL 1863892 (Wash.App. Div. 2))

reach agreement, so the trial court issued the 1998 closing plan.

The 1998 closing plan addressed “the administrator’s Final Report and Petition for a Decree of Distribution.” CP at 1959. The order approved certain administrator, attorney, and accountant fees; listed assets remaining in the Estate; and directed how to dispose of real property and liquidate corporate entities remaining in the Estate. It also authorized distributions to the administrative claimants to satisfy the approved claims so long as sufficient assets remained in the Estate to carry out the distribution and closing plans. The last paragraph of the closing plan stated, in a handwritten addendum, “This order is entered as a final order on this day.” CP at 1964.

*5 Ellis relies on RCW 11.76.030, which sets out what constitutes a final report required to close an estate. Ellis contends that the 1998 closing plan qualified as a final report and that the “an order approving a Final Report of an administrator in a probate proceeding is a final order.” Ellis Br. at 8. Because Gary did not appeal the 1998 closing plan, Ellis asserts that “it is final and res judicata” on “all matters covered” and “all questions that should have been raised” at the time of the hearing. Ellis Br. at 9-10.

Ellis further argues that the 2005 and 2006 distribution orders (collectively, the interim distribution orders), made in accordance with the closing plan, were also final orders for the purposes of the appeal period. She states that all parties had notice of these interim distributions, that the trial court considered and rejected objections, and that the orders should have been appealed when entered. Consequently, she contends that the only issues we should consider in this appeal are those arising out of the 2007 closing order.

Sidney counters that by asserting a jurisdictional ground, Ellis attempts to distract us from properly appealed issues. He also asserts that in 2001, we recognized that Gary had been unable to litigate issues in 1996 and 1997, that in 2004 he learned of

important facts only after William died and that we should not deprive him of the ability to fully litigate his claims related to the Estate’s administration.

Ellis relies on *Batey v. Batey*, 35 Wash.2d 791, 215 P.2d 694 (1950), to support her argument that appeal of issues related to the 1998 closing plan are untimely. *Batey* explains that

[t]he order of the probate court approving the guardian’s final account is a final judgment and is entitled to the same consideration as any final judgment entered by the superior court.

Our decisions to this effect are referred to in *Ryan v. Plath*, 18 Wash.2d 839, 140 P.2d 968, 977 [1943], where this court said: “Appellant recognizes the settled law in this state that orders and decrees of distribution made by superior courts in probate proceedings upon due notice provided by statute are final adjudications having the effect of judgments *in rem* and are conclusive and binding upon all persons having any interest in the estate and upon all the world as well. See the following recent decisions of this court upon this question, and the many prior decisions cited therein: *Farley v. Davis*, 10 Wash.2d 62, 116 P.2d 263 ... [1941]; *Castanier v. Mottet*, 14 Wash.2d 615, 128 P.2d 974 [1942]; *In re Christianson’s Estate*, [16] Wn.[2d 48], 132 P.2d 368 [1942].”

35 Wash.App. at 796, 670 P.2d 663 (some alternations in original). See also *Manning v. Mount St. Michael’s Seminary of Philosophy & Science*, 78 Wash.2d 542, 548, 477 P.2d 635 (1970) (“This court has often said that orders and decrees of distribution made by superior courts in probate proceedings ... are conclusive and binding upon all persons having any interest in the estate and upon all the world as well.”); *Bostock v. Brown*, 198 Wash. 288, 292, 88 P.2d 445 (1939) (providing that an order approving a final report and distribution is “res judicata of all matters covered by that order and all questions that should have been raised at the hearing upon the final account and petition for dis-

Not Reported in P.3d, 2009 WL 1863892 (Wash.App. Div. 2)
(Cite as: 2009 WL 1863892 (Wash.App. Div. 2))

tribution”); *In re Ostlund's Estate*, 57 Wash. 359, 364-66, 106 P. 1116 (1910) (determining that a probate court decree distributing property is final).

*6 Sidney primarily relies on *In re Peterson's Estate*, 12 Wash.2d 686, 123 P.2d 733 (1942), to support his argument. Sidney asserts that according to *Peterson*, interested parties can contest distribution orders or periodic reports at any time. 12 Wash.2d at 716, 123 P.2d 733. In *Peterson*, the court noted that

[t]he order with which we are here concerned, however, was not an interim order, nor did it partake of the nature of such an order. It purported to be a *final* order fixing the entire allowance for fees over and above what had already been allowed some years before. No such order should have been made, nor should ever be made, prior to the final accounting, for it is then that all the interested parties are given notice according to the statute and have the right to be heard upon all matters affecting the administration and distribution of the estate.

12 Wash.2d at 717, 123 P.2d 733. Sidney argues that the 1998 closing plan was either an interim order and not a final order under RCW 11.76.030, or a final order that should not have been entered.

The 1998 closing plan was entered under RCW 11.76.030. Although the law is settled on the finality of orders entered under RCW 11.76 .030, the peculiar circumstances of this case weigh against our simply finding the 1998 closing plan appealable as a final order at the time it was entered. *E.g.*, *Batey*, 35 Wash.2d at 796, 215 P.2d 694.

Days before the hearing on the closing plan on January 21, 1997, the trial court dismissed Gary's claims against William for improper administration of the Estate as a sanction under CR 37, and we reversed this decision and remanded. *DelGuzzi I*, 1999 WL 10081 at *3, 5-6. On remand, the trial court “again dismissed [Gary's] claim, reasoning that at the January 21, 1997, hearing on [William]'s

final report and accounting for the estate, [Gary] had adequate opportunity to raise any and all claims and had lost.” *DelGuzzi II*, 108 Wash.App. 1003, 2001 WL 1001082 at *3.

In the second appeal of the dismissal, in 2001, we wrote,

[William] contends that *res judicata* bars [Gary's] claims because [Gary] had a chance to litigate fully those claims in the Final Accounting hearing of January 21, 1997. The record is to the contrary. Because another judge had dismissed [Gary's] wrongful-estate administration claims as a sanction for discovery violations, the trial court limited the January 21 hearing to [William's] final accounting of the estate. [Gary] neither presented nor had an opportunity to present his claims at that hearing.

DelGuzzi II, 108 Wash.App. 1003, 2001 WL 1001082 at *7.

We based our decision that the second dismissal was improper on a number of factors. First, because the claims had already been dismissed by the time of the hearing on the closing plan, Gary had no claims before the trial court for it to rule on. *DelGuzzi II*, 108 Wash.App. 1003, 2001 WL 1001082 at *7. “Second, although at the Final Accounting hearing, [Gary] could have alleged that [William] had breached his fiduciary duties, [Gary] had no evidence to support such allegations” because the trial court had previously denied compelling answers to his discovery requests. *DelGuzzi II*, 108 Wash.App. 1003, 2001 WL 1001082 at *7. Consequently, “because he could not compel discovery and because he no longer had an active claim, [Gary] could not have offered crucial evidence in the previous proceeding to establish the necessary facts underlying his dismissed claims.” *DelGuzzi II*, 108 Wash.App. 1003, 2001 WL 1001082 at *7. We will not disturb this reasoning in the appeal now before us.

Not Reported in P.3d, 2009 WL 1863892 (Wash.App. Div. 2)
(Cite as: 2009 WL 1863892 (Wash.App. Div. 2))

B. Interim Distribution Orders Entered Pursuant to
1998 Closing Plan

*7 Even assuming that the 1998 closing plan could not be appealable as a final order when entered, however, we still must decide whether it is proper to address Gary's (now Sidney's) appeal in 2009, eleven years after the entry of the 1998 closing plan. Ellis argues that the interim distribution orders made under the terms of the closing plan cannot now be appealed. We agree that these orders were final when entered and Sidney cannot now raise issues on appeal that arose before the entry of the second interim distribution order, on June 2, 2006.

In 2005, Ellis moved to approve a disbursement to the administrative claimants. Sidney objected and requested that the trial court deny the disbursement, order a constructive trust on all assets until "the Estate of Gary DelGuzzi has been fully compensated for its property that has been converted, disappeared or gone missing during the probate," deny motions to quash subpoenas for estate records, allow the parties to meet to resolve some procedural issues, and set the matter for trial.^{FN8} The trial court granted the motion for the disbursement and quashed the subpoenas. Sidney did not appeal.

FN8. In the earlier appeals, we determined that Gary had been unable to fully pursue his claims due to discovery issues. *Del-Guzzi II*, 108 Wash.App. 1003, 2001 WL 1001082 at *7. In the current appeal, however, Sidney's attorney, Cruikshank, states that he received a "big discovery break" in 2004, after William died and Martin temporarily served as the administrator for the Estate. Cruikshank Reply Br. at 11, 5. We note that this "big discovery break" occurred *before* the trial court entered the 2005 distribution order, such that issues related to Gary's earlier alleged inability to pursue his claims do not control here. *See also Shaw v. Short, Cressman & Burgess, PLLC*, noted at 150 Wash.App. 1017, 2009 WL 1366272, at *4

(stating that Shaw knew or should have known of alleged irregularities prior to 2004).

Ellis filed an annual report in January 2006, summarizing fund distributions and properties sold. She filed a second interim distribution motion on May 18, ^{FN9} 2006, again to make a distribution to the administrative claimants. The trial court approved the distribution on June 2, 2006. Sidney did not appeal.

FN9. When Sidney moved to close the Estate on May 8, 2006, he did not raise any issues of administrator incompetence.

Ellis cites *Tucker v. Brown*, 20 Wash.2d 740, 800, 150 P.2d 604 (1944), for the proposition that "interim orders made during the course of probate after notice of the hearing are final in their nature and cannot be attacked or litigated at the hearing upon the final report." Sidney counters, citing *Peterson*. That case is inapposite.

The trial court entered its order in *Peterson* on an ex parte basis. Our Supreme Court refused to declare the order final and appealable in part because the affected parties had not been notified and, thus, could not object. *Peterson*, 12 Wash.2d at 717-18, 123 P.2d 733. Here, in contrast, Gary (and later, Sidney) does not argue lack of notice or opportunity to object as to any order. Moreover, as noted, multiple cases stand for the proposition that probate distribution orders made with proper notice and opportunity to object are final and appealable when entered. *Manning*, 78 Wash.2d at 548, 477 P.2d 635; *Batey*, 35 Wash.2d at 796, 215 P.2d 694; *Bostock*, 198 Wash. at 292, 88 P.2d 445; *Ostlund*, 57 Wash. at 364-66, 106 P. 1116.

In order to determine the finality of the 2005 and 2006 orders, we must decide whether an order that the parties consider an "interim" order, contemplating further action (as opposed to an order that closes an estate), can be a final order. Here, the trial court entered the 2005 and 2006 interim distribu-

Not Reported in P.3d, 2009 WL 1863892 (Wash.App. Div. 2)
(Cite as: 2009 WL 1863892 (Wash.App. Div. 2))

tion orders pursuant to the 1998 closing plan and neither order fully dismissed the action.

As noted, the *Tucker* case addresses orders issued by a trial court in probate matters. 20 Wash.2d at 800-01, 150 P.2d 604. In that case, an administrator filed an accounting and report on December 15, 1937, but the action remained open. *Tucker*, 20 Wash.2d at 794, 150 P.2d 604. The court recognized the legal rule that “interim orders made during the course of probate after notice of the hearing are final in their nature.” *Tucker*, 20 Wash.2d at 800, 150 P.2d 604. Although the *Tucker* court did not find the 1937 order final on factual grounds, it repeated “[t]here can be no quarrel” with the legal rule of finality. 20 Wash.2d at 800, 150 P.2d 604; see also *In re Merlino's Estate*, 48 Wash.2d 494, 496, 294 P.2d 941 (1956) (stating that “[a]n interim order made during the course of probate, after notice of the hearing, is final in its nature”); *In re Krueger's Estate*, 11 Wash.2d 329, 351, 119 P.2d 312 (1941) (determining that interim order of approval of periodic report of estate estops those with notice of the proceedings from “objecting thereto at the final hearing”).

*8 We apply this probate rule here and note that, but for the peculiar procedural background of this case discussed in the second appeal, the 1998 closing plan would have been final at the time it was entered. This is because the parties had notice and an opportunity to challenge the closing plan order. Further, the order addressed the propriety of William's administration, analyzed past distributions, and set up a plan for future distributions.

When we view the 2005 and 2006 interim distribution orders in conjunction with the 1998 closing plan, we see that the interim distribution orders became final when entered. That is, because Sidney had notice of the interim actions and, in fact, filed a full objection to the 2005 proposed distribution that addressed the underlying problems that he identified with the overall administration of the Estate, the orders became final when entered.^{FN10}

FN10. Moreover, as discussed in footnote 8, herein, the alleged restrictions on the representative's inability to fully pursue claims against William (or his estate) that arguably existed in 1998, no longer existed by 2005.

Thus, the only issues Sidney can raise in this third appeal are those arising out of Ellis's actions taken between the date of the 2006 interim distribution order through the 2007 final closing order. We now address Sidney's challenges to the 2007 final closing order.^{FN11}

FN11. After oral argument, Sidney filed supplemental documents retrieved from earlier DeIGuzzi appeal archives to further address Ellis's arguments regarding the appealability of the 1998 closing plan and the interim distribution orders. The documents include a notice for discretionary review dated July 19, 2004; a ruling denying review; a second motion dated November 5, 2004, with additional documents related to that motion, including a ruling denying review.

The July 19, 2004 motion sought to appeal the trial court's continuance of a hearing Margaret requested on motions to appoint an administrator for the Estate, to vacate the 1998 closing plan, and for other relief. Our commissioner denied review on the grounds that the trial court had “not yet made a decision or entered an order” granting or denying the requested relief. Commissioner's Ruling (July 29, 2004) at 3.

The November 5, 2004 motion sought review of an order denying partial summary judgment to Margaret via an order to show cause. In the trial court, Margaret sought summary judgment on portions of the claims presented in the July 1996 complaint. The commissioner

Not Reported in P.3d, 2009 WL 1863892 (Wash.App. Div. 2)
(Cite as: 2009 WL 1863892 (Wash.App. Div. 2))

denied the motion because “[t]his court has been provided very little record and cannot fairly review the trial court’s decision,” and because factual disputes remained with respect to certain allegations, making summary judgment inappropriate. Commissioner’s Ruling (Nov. 5, 2004) at 2-3.

Neither of these motions for discretionary review concern the interim distribution orders (both motions were submitted before the interim distribution orders were issued). Further, the motion that references the 1998 closing plan appeals only an alleged scheduling error. Consequently, these supplemental authorities have no impact on our analysis of the appealability of the 1998 closing plan or the interim distribution orders.

The 2007 Closing Order

Ellis filed a supplemental report on June 11, 2007, and the trial court entered an order approving the final distribution, closing the case on submission of certain receipts, and discharging the bond of the personal administrator. The 2007 closing order also addressed a \$15,643.45 distribution and the disposition of a parcel of real estate. This order is appealable.

A. Standards of Review

In general, because proceedings for probate of wills are equitable, we review the record *de novo*. *In re Estate of Black*, 116 Wash.App. 476, 483, 66 P.3d 670 (2003), *aff’d on other grounds*, 153 Wash.2d 152, 102 P.3d 796 (2004). *Black*, however, sets out a more lenient standard of review for the award of attorney fees in probate:

RCW 11.96A.150 gives the court discretionary authority to award attorney fees from estate assets. And we will not interfere with the decision to allow attorney fees in a probate matter, absent

a manifest abuse of discretion. Discretion is abused when it is exercised in a manner that is manifestly unreasonable, on untenable grounds, or for untenable reasons. Because of the “almost limitless sets of factual circumstances that might arise in a probate proceeding,” the legislature “wisely” left the matter of fees to the trial court, directing only that the award be made “ ‘as justice may require.’ ”

116 Wash.App. at 489, 66 P.3d 670 (citations omitted).

Ellis asserts that she acted in accordance with the 1998 closing plan and that the trial court did not abuse its discretion in approving the closing of the Estate. Sidney disputes this assertion on numerous grounds.

B. Closing Procedure

Sidney first contends that Ellis failed to follow the procedures set forth in RCW 11.76.020-.050 and RCW 11.28.240. Sidney argues that these statutory requirements are mandatory and that the trial court erred in closing the Estate.^{FN12} In particular, he claims that RCW 11.76.030, .040, and RCW 11.28.240 require that all devisees be named and informed of the closing, and RCW 11.76.030 also requires description of undisposed estate property.

FN12. The parties do not clearly refer to the Estate as either closed or not closed. Sidney argues that the trial court erred in closing the Estate and that the Estate is not yet closed. Ellis states that she has not distributed the funds and property that were the subject of the 2007 final closing order. The 2007 closing order states that the Estate shall be closed upon the filing of receipts that show final disbursements have been made. As of oral argument before us on this current appeal, this had not been done.

We note that Division One observed that

Not Reported in P.3d, 2009 WL 1863892 (Wash.App. Div. 2)
(Cite as: 2009 WL 1863892 (Wash.App. Div. 2))

the Estate is closed. *Shaw v. Short, Cressman & Burgess, PLLC*, noted at 150 Wash.App. 1017, 2009 WL 1366272, at *2 n. 5. Because the probate court entered a closing plan and a closing order that the administrator has substantially complied with, and because the status of the Estate was not relevant to the Division One matter, we do not consider ourselves bound by this statement.

*9 These procedural issues relate to entry of an order to close an estate under RCW 11.76.030 and should have been fully litigated by Gary at the time the trial court entered the closing order under this statute in 1998. The 2005 and 2006 interim orders, as well as the 2007 closing order, all proceeded on the correct assumption that the trial court had entered a closing plan under RCW 11.76.030 in 1998.

Although, as previously discussed, we recognize that the 1998 closing plan could not have been final as to claims of William's incompetence, Sidney's predecessor could have previously litigated these procedural claims. In addition, in 2006, Sidney himself moved to close the Estate and he did not allege any procedural errors or administrator incompetence. His argument about Ellis's closing procedures fails.

C. Attorney Fees

Sidney next contends that Ellis failed to comply with the 1998 closing plan when paying fees to William and to the Short, Cressman & Burgess law firm.^{FN13} The majority of Sidney's argument regarding fees, however, does not discuss these payments and, instead, argues that earlier payments under the 1998 closing plan intentionally, by private agreement, violated the 1:4 fee ratio set out in the plan.^{FN14} To the extent that these objections regarding previous payments address events occurring *before* 2006, we do not entertain them. As previously discussed, this appeal may only raise issues

occurring *after* the 2006 interim distribution order.

FN13. Short, Cressman & Burgess represented Gary and William in their capacity as personal representatives between 1982 and 1991. In 1994 and 1996, Gary asserted tort claims against the law firm. The trial court dismissed the claims based on lack of standing under *Trask v. Butler*, 123 Wash.2d 835, 845, 872 P.2d 1080 (1994), and Gary did not appeal. We granted Short, Cressman & Burgess leave to file an amicus brief in this matter concerning claims as to their attorney fees.

FN14. Specifically, he argues that the 1998 closing plan set out a certain ratio of payments to two parties, William and Short, Cressman & Burgess, and that the parties subsequently entered into a private agreement for a different ratio in violation of the plan. The 1998 closing plan authorized the administrator to make pro rata distributions to the administrative claimants and stated, "[a]ny pro rata interim distribution shall be based on the ratio of the amount of each administrative claim to the total amount of all three administrative claims." CP at 1964.

Sidney observes that the 1998 plan payments for past work to William and Short, Cressman & Burgess resembled a 1:4 ratio, approximately \$400,000 to Short, Cressman & Burgess and \$1.6 million to William. Sidney alleges that in exchange for tolling the applicable statutes of limitations related to possible disputes between them, William and Short, Cressman & Burgess changed the payment ratio from 1:4 to 1:1. We note that the ratio of \$3,130.13 to William's estate and \$2,343.97 to Short, Cressman & Burgess is not 1:1 and that Sidney does not address whether these payments are within the specified ratio set out in

Not Reported in P.3d, 2009 WL 1863892 (Wash.App. Div. 2)
(Cite as: 2009 WL 1863892 (Wash.App. Div. 2))

the 1998 closing plan.

In 2007, Ellis distributed the following funds: \$3,130.13 to William's estate and \$2,343.97 to Short, Cressman & Burgess. Although Sidney attacks multiple earlier and larger payments to William and Short, Cressman & Burgess, he does not raise any specific assignment of error related to the two 2007 payments. Therefore, we do not address this argument because it has not been properly presented for review. RAP 10.3(a)(4), (6); *State v. Stubbs*, 144 Wash.App. 644, 652, 184 P.3d 660 (2008).

D. Receipt Filings

Sidney further contends that Ellis failed to file proof of receipts and disbursements as required by the 2007 closing order. The 2007 final closing order states "that this estate shall be closed upon the filing of receipts showing disbursement and distribution of the remaining property of this estate." CP at 1784-85. The remaining real property listed in the order and in the Ellis declarations was a piece of real estate known as "9999 Bumpy Rd, Port Angeles, WA," that Ellis proposed distributing to an administrative creditor in lieu of additional payment. CP at 268. A handwritten addition to the order addressed property that could not be profitably sold and allowed Ellis to dispose of the property for \$1,200 if no fees or costs of the sale were paid by the Estate. The final cash in the Estate amounted to approximately \$15,000, to be paid out to various administrative claimants as set out in Ellis's declaration.

It is apparent to us that Ellis cannot file the receipts because she states she has not yet made the final disbursements under the order. Thus, this argument lacks merit and we do not address it further.

E. Account for Property Sales

*10 Sidney also contends that Ellis failed to account for various property sales during her adminis-

tration. As discussed, the 2007 closing order covers only certain pieces of real property and a small sum of cash. Sidney argues extensively about other property sales and specifically challenges the sale of property known as "999 Three Sisters Road." Appellant's Amended Br. at 33. Ellis responds that this sale occurred in 2005 and was covered by the 2005 interim distribution order.

Sidney objected to the property sale in 2005, before the trial court entered the 2005 distribution order. The trial court ordered distribution of the proceeds of the property in the 2005 order and Sidney did not appeal. For the reasons previously discussed regarding the need to appeal the interim distribution orders at the time the trial court enters them, we do not address this issue.

F. Inventory and Appraisal

Finally, Sidney contends that Ellis failed to provide a verified inventory and appraisal. RCW 11.44.015, .025, and .050. Sidney requested an inventory and appraisal from Ellis in 2006. Specifically, he argued that, because William's prior inventory did not list certain properties that Ellis stated she had sold, she had a duty to re-inventory the missing parcels.^{FN15}

FN15. Sidney's motion did not identify the missing properties nor does he list them on appeal.

Before Sidney filed a motion for an inventory, Ellis sent him a letter dated June 7, 2006, in which she stated that she did not believe a new inventory was needed but asked him to consider the letter as a new inventory and appraisal. She explained that the only remaining property in the Estate was the Bumpy Road parcel, that had a pending purchase offer of approximately \$25,000. She added that she expected to receive an additional \$4,500 from a secured promissory note. She attached tax returns to the letter.

Neither party mentions whether the trial court ex-

Not Reported in P.3d, 2009 WL 1863892 (Wash.App. Div. 2)
(Cite as: 2009 WL 1863892 (Wash.App. Div. 2))

plicitly considered Sidney's 2006 motion. Nevertheless, Sidney cannot identify the harm Ellis caused by her alleged failure to further inventory and appraise unnamed properties. Neither does he request any remedy on remand for this alleged neglect. As stated in Ellis's letter, all parties knew of the Bumpy Road property and that she was not going to expend Estate funds preparing additional formal inventories and appraisements.

Any remedy for Ellis's failure to file an inventory is discretionary. *Clancy v. McElroy*, 30 Wash. 567, 568, 70 P. 1095 (1902) (stating that court has discretion to retain executor even when executor fails to file a required inventory in a timely manner). A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds. *In re the Marriage of Muhammad*, 153 Wash.2d 795, 803, 108 P.3d 779 (2005).

Here, the trial court did not abuse its discretion in not ordering an inventory or appraisal or otherwise penalizing Ellis because her letter sets out reasonable grounds for her decision not to prepare a new inventory and appraisal. See RCW 11.44.050; *Clancy*, 30 Wash. at 568-69, 70 P. 1095.
^{FN16} The argument fails.

FN16. Sidney also contends that Ellis filed deficient bookkeeping records for the period 1997-2004. Sidney bases his argument on gaps in the accounting occurring up to 2004. As previously discussed, we do not address issues pertaining to actions prior to the 2006 interim order.

G. Change of Venue Order without Consolidation

*11 Sidney next contends that the trial court erred in entering its change of venue order moving Sidney's 2006 claim to King County.^{FN17} He asserts that the trial court also should have consolidated the July 1996 and 2006 cases before moving them to King County. Otherwise, he asserts, that failure to consolidate the July 1996 case with the nearly

identical 2006 case "makes an orphan of the 1996 ... complaint" and we should not allow both matters to continue in two different counties. Appellant's Amended Br. at 37-38.

FN17. The events leading up to the trial court's decision to move the 2006 case to King County do not clearly demonstrate that Sidney requested consolidation in conjunction with Loretta's November 2007 request to change venue. On November 2, 2007, Loretta moved to change the venue of the 2006 case to King County. The supporting materials indicate that Loretta unsuccessfully sought attorney Cruikshank's stipulation to the change. Cruikshank instead moved for a change of venue "and other relief" on October 26, 2007, two weeks before Loretta's motion was filed, but this "other relief" is not described. Loretta Br. Append. 11, at 3. In the record, there is also a motion dated October 19, 2007, in which Martin requested consolidation of the cases and a change of venue to King County.

Attached to Sidney's reply brief is a different, earlier motion prepared (but apparently not filed) by Loretta discussing venue of the 2006 case and consolidation of the 2006 and 1996 cases. This motion requested consolidation of the 1996 and 2006 cases. This motion was noted for hearing on June 29, 2007, and is signed by Loretta's attorney, but it does not have a "filed" stamp and does not appear in the Clerk's Papers at 1416, as stated in the handwritten notation on the first page of the copy attached to the reply brief.

In December 2007, the Clallam County Superior Court changed venue of the 2006 case to King County. The order did not address consolidation of the 1996 and 2006 cases. By an amended notice of appeal, Sidney appeals the trial court's change of



Not Reported in P.3d, 2009 WL 1863892 (Wash.App. Div. 2)
(Cite as: 2009 WL 1863892 (Wash.App. Div. 2))

ceived unauthorized real estate commissions; (4) William's accounting of May 15, 1998, requested compensation for unexplained overhead and fees; (5) William sold a Malcolm Island property for significantly less than its actual value; (6) the 1998 closing plan miscalculated fees owed to Short, Cressman & Burgess; (7) loans should not have been made to the estate by William and Short, Cressman & Burgess in the mid-1980s and that there was no business justification for the loans; and (8) the Kleinman report shows missing assets. As for administrator Ellis's early activities, Sidney claims she failed to investigate the above claims and that she did not properly account for various sales of property.

We note that many of these issues overlap with those in the still-pending July 1996 complaint, as described by the parties. *See* note 2, *supra* (describing 1996 action). We recognize that this opinion disposing of these issues has a preclusive effect on the unresolved July 1996 action.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

We concur: VAN DEREN, C.J., and HUNT, J.
Wash.App. Div. 2, 2009.
In re Estate of DelGuzzi
Not Reported in P.3d, 2009 WL 1863892
(Wash.App. Div. 2)

END OF DOCUMENT

Appendix 4

Demonstrative Exhibit of Plaintiff:
Defendant's Motion for Summary
Judgment Argument, August 21,
2009

Why Delguzzi-3 Does Not Impact Martin v. Estate of Wilbert

